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# Law Review's Empire

by

E. JOSHUA ROSENKRANZ\*

The recent indictment of the American law school as a reproducer of illegitimate hierarchy leaves one wondering whether nothing remains sacred.<sup>1</sup> Virtually no aspect of the law school has escaped attack. Its atmosphere has been decried as impersonal and anti-intellectual;<sup>2</sup> its professors derided for mystifying and cruelly subjugating their students;<sup>3</sup> and its curriculum criticized as morally bankrupt and politically tilted.<sup>4</sup> All these effects coalesce, it is said (with the self-righteousness of one who has resisted evil forces to which mere mortals fall prey), to breed cronies for the corporate law firm.<sup>5</sup>

Whether one is an attacker, a defender, or an innocent bystander in the legal-education battle, one can scarcely help but notice that the student-run law review has escaped the fray virtually unscathed.<sup>6</sup> The clem-

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1. See, e.g., Feinman, *The Failure of Legal Education and the Promise of Critical Legal Studies*, 6 CARDOZO L. REV. 739 (1985) [hereinafter Feinman, *Failure*]; Feldman & Feinman, *Legal Education: Its Cause and Cure* (Book Review), 82 MICH. L. REV. 914 (1984) [hereinafter Feldman & Feinman, *Cause and Cure*] (reviewing R. STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983)); Foster, *The "Cooling Out" of Law Students: Facilitating Market Cooptation of Future Lawyers*, in GOVERNING THROUGH COURTS 177 (1981); Halpern, *On the Politics and Pathology of Legal Education*, 32 J. LEGAL EDUC. 383, 383 (1982); Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW 40 (D. Kairys ed. 1982) [hereinafter Kennedy, *Hierarchy*].

2. See *infra* notes 47-57 and accompanying text.

3. See *infra* notes 13-21 and accompanying text.

4. See *infra* notes 59-65 and accompanying text.

5. See *infra* notes 66-73 and accompanying text.

6. Legal writing and scholarship have been critiqued extensively, see *infra* notes 136-139 and accompanying text, *infra* note 180, and law professors have been increasingly vocal in bemoaning the power that student-run law reviews wield over them, see *infra* notes 35-41 and accompanying text. The law review as an institution, however, has only recently been spotlighted. See Boyle, *Dumping: (Colon) on Law Reviews*, CLS, May 1987, at 17; *Student-Edited*

ency is remarkable. The law review undoubtedly has the potential to be a serious force against law school alienation, a worthwhile intellectual and creative experience, and a formidable political actor. Unfortunately, this cadre of overachievers grossly underachieves—no, retrogrades—in each respect.

As to the sense of alienation and self-doubt that law school foments, the law review, far from counterpoising them, enhances both. It represents a blatantly artificial credential that nonmembers manage to internalize. It generates even more artificial intra- and inter-school hierarchies that members internalize. So, if indeed alienation and illegitimate hierarchy plague the law school, one of their prime progenitors must be the student-run law review.

In addition, the law review's academic and creative value is overstated. Many students leave law review with little more to show for their two-year membership than bluebook proficiency. To the extent that the law school curriculum is intellectually or creatively destitute, the law review experience is at least as deficient in those categories.

As to political action, the law review—in propagation of the myth that refusal to take a stand constitutes political neutrality—perpetuates the status quo by standing for (or against) nothing. For better or for worse, no other law school institution has a cozier symbiosis with the corporate law firm.

"What is wrong with law reviews?," queries James Boyle. "RESET What isn't wrong with law reviews?"<sup>7</sup> Yet no one—neither member nor nonmember—has denounced it as a sham. Except possibly for an increase in membership<sup>8</sup> and proliferation,<sup>9</sup> the law review has remained intact and unchanged for a century.<sup>10</sup> And it is remarkably similar from

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*Law Reviews*, 36 J. LEGAL EDUC. 1, 1-23 (1986) (article by Roger Cramton and commentary by Paul Carrington, John Kester, John Henry Schlegel, and Elyce Zenoff).

7. Boyle, *supra* note 6, at 17. Professor Boyle continues: "On what ground (aesthetic, literary, scholarly, intellectual, political, egalitarian), by what criteria (originality, readability, incisiveness) are they not a dismal failure? Where else is the time of so many skilled, intelligent and potentially creative people expended to produce so little useful effect?" *Id.*

8. See Cramton, "The Most Remarkable Institution": *The American Law Review*, 36 J. LEGAL EDUC. 1, 6 n.24 (1986) [hereinafter Cramton, *American Law Review*] (staffs have doubled between late 1950s and early 1980s); Zenoff, *I Have Seen the Enemy and They Are Us*, 36 J. LEGAL EDUC. 21, 21 n.1 (1986).

9. There are over 250 law reviews affiliated with law schools, and most of them are student-run. Cramton, *American Law Review*, *supra* note 8, at 2. They publish an estimated 150,000 to 160,000 pages per year. *Id.*; Fidler, *Law Review Operations and Management*, 33 J. LEGAL EDUC. 48, 48 (1983).

10. See Schlegel, *An Endangered Species?*, 36 J. LEGAL EDUC. 18, 19 n.3 (1986) (reiterating Dean Hutchins's observation in 1920s that law review's product has changed little in last 50 years). On the law review's history and origins, see generally Cramton, *American Law*

concerns are worthy of consideration in assessing the law review's institutional role.

## I. A Preliminary Defense of Law Reviews

The law review, in theory, has much to offer. First, it could counterpoise what to some might otherwise be a thoroughly alienating law school experience. Second, its creative and intellectual focus could sharpen the student's lawyering skills, encourage the student to develop novel solutions to legal and social problems, and expose the student to new ideas. Finally, the law review's dealienating potential, and its creative and intellectual focus could coalesce to offer its members a unique invitation to social action.

### A. Combatting Law School Alienation

The law school has been criticized, somewhat justifiedly, for its systematic alienation of students. To the extent that those criticisms are justified, the law review could do much to counteract that alienation.

#### *(1) Sources of Alienation in the Law School*

The most vicious denouncers of law school alienation spare no one. Professors, administration, the system, and students share the blame. An outsider reading the harshest accounts would picture law school as a hostile society dominated by sadistic and insecure professors, ruled by an aloof administration, and overrun by thugs ready to slit each others' throats for survival or sheer pleasure.<sup>11</sup>

The worst-case scenario, as depicted by the harshest critics, looks something like this: Law professors—every one them a Kingsfield<sup>12</sup> clone—are determined to subjugate their quaking disciples. "Fear, intimidation, and psychological manipulation of a law student's sense of self" are customary.<sup>13</sup> The professor's determination to deploy such psychological weapons might spring from an insecure need to pick on an easy target.<sup>14</sup> Or perhaps it stems from a benign, if misguided, objective to build character in students, preparing them for the harsh lawyer-eat-

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11. For vivid fictional accounts of the law school experience written by two former law students, see J. JAY, *THE PAPER CHASE* (1971) and S. TUROW, *ONE L* (1977).

12. See J. JAY, *supra* note 11.

13. Halpern, *supra* note 1, at 388.

14. See Davis, *The Courtroom Mystique and Legal Education*, 23 ARIZ. L. REV. 661, 685 (1981) (law professors are tempted "to choose as a target the neophyte rather than the experienced opponent, to assert competence in the classroom") (footnote omitted).

one law school to the next. If the law review has failed, a great number of people have kept it secret.

This Article examines the law review's record and, at the risk of being forever excommunicated from law review's empire, divulges its two deep, dark secrets. It begins with a discussion of the law review's theoretical potential—as a dealienating force in the law school environment, nurturer of creativity and intellect, and political actor. The remainder of the Article identifies the respects in which the law review fails to fulfill that potential and suggests explanations for that failure. Section II discusses the expectations that law review members have upon joining its ranks and concludes that diminished expectations could diminish the value of the experience.

Then come the two deep, dark secrets. The first secret is that the law review credential is false. Section III examines the law review selection processes, including grades, writing competitions, and the submission of publishable notes, and concludes that they do not select for the skills most relevant to the editing of a law review. Section IV develops and divulges the second deep, dark secret: The experience is illusory. It then offers some speculations as to why the members remain on law review without divulging either secret.

Section V discusses the self-doubt that plagues law review members because of law review hierarchies. Specifically, within a particular law review class, an unspoken hierarchy can emerge based upon the differing processes by which students are selected, and between law reviews there exist inter- and intra-school hierarchies. Finally, section VI examines the law review's role as a political actor. First, it concludes that the law review has only limited autonomy over its own operations, and is unlikely to be a force in law school politics. Moreover, a false sense of neutrality prevents the law review from acting affirmatively as a political force. In the end, the law review serves as little more than a breeding ground for the corporate law firm.

I emphasize at the outset that I do not accept wholeheartedly the critical indictments of the law school mentioned above and discussed throughout. Yet those indictments provide a useful point of departure. They illustrate—if sometimes to the point of caricature—some legitimate concerns worth considering in evaluating the law school as an institution. Because the law review shares many of the features of law school, those

lawyer world.<sup>15</sup> Whatever their motivation, professors go out of their way to humiliate their students publicly, in a bizarre ritual of "pseudo-participation."<sup>16</sup> Instead of rebelling, however, the student internalizes the abuse. Self-doubt sets in: "I *deserve* to take this shit. I am wrong and stupid. There is no reason why I should be treated by this great man with even the most minimal human respect."<sup>17</sup>

Professors in this worst-case scenario also mystify the simplest of concepts.<sup>18</sup> The mystification may be an unintended byproduct of a visionary learning theory: the student will never truly understand the law unless he discovers it for himself. Perhaps the mystification grows out of the professor's instinctual self-preservation: if the law is made too palatable, the professor will exhaust her knowledge and lose her job. Perhaps it is simply that professors are too engrossed in their own scholarship<sup>19</sup> or preoccupied with their own prestige<sup>20</sup> to worry much about the quality of their teaching.<sup>21</sup> Whatever the reason for the mystification, it confuses and frustrates the student.

The law professors only compound the alienation caused by what some consider to be an inherently oppressive system. That system, it is

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15. See *id.* at 683 (courtroom mystique that underlies law teaching is "paradoxical" because it is "hailed by the lawyer who, relatively speaking, is least likely to assess it—the law teacher") (footnote omitted); Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71, 81-83 (1970) [hereinafter Kennedy, *Polemic*] ("a faculty member should think twice before arguing that the particular emotional atmosphere which dominates the classroom is . . . in some sense essential to the production of successful graduates").

16. Kennedy, *Hierarchy*, *supra* note 1, at 42.

17. Kennedy, *Polemic*, *supra* note 15, at 76 (emphasis in original).

18. See Kennedy, *Hierarchy*, *supra* note 1, at 45-47 (describing elements of legal education and three-part mystification of law). Entering students often "believe that law has an objective content, available to lawyers through their privileged access to certain secret books and mysterious processes." Feinman & Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875, 877 (1985) [hereinafter Feinman & Feldman, *Pedagogy*]. The criticism is that law professors do little to disabuse them of, and in fact reinforce, that notion. But see Deutsch, *The Teaching of Corporate Law: A Socratic Investigation of Law and Bureaucracy*, 97 YALE L.J. 96 (1987) (defending Socratic method against challenges of critical legal scholars).

19. See Hacker, *The Shame of Professional Schools*, 32 J. LEGAL EDUC. 278, 278-79 (1982) (law faculty cares more about their personal pursuits than about student needs). But cf. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 10 (1986) [hereinafter Cramton, *Demystifying*] ("In the American law school, unlike most of the graduate departments of the university, teaching has been given a more rightful status.").

20. Cramton, *Demystifying*, *supra* note 19, at 13-14 (law faculty's pursuit of prestige is antithetical to student's learning); Feinman, *Failure*, *supra* note 1, at 747 ("From the law faculty's perspective, personal and professional prestige are, for the most part, unrelated to the performance of graduates.").

21. See Feldman & Feinman, *Cause and Cure*, *supra* note 1, at 929-30 ("In the traditional law school vision, the focus is on teaching, not learning." (footnote omitted)); Feinman & Feldman, *Pedagogy*, *supra* note 18, at 875 ("Most legal educators are anti-intellectual about the area of their primary professional concern: the content and method of legal education.").

said, instills in law students a feeling of utter lack of autonomy. First, the curriculum, particularly in the first year, is prescribed and therefore beyond the law student's control.<sup>22</sup> Second, "[p]hysical and psychological exhaustion are . . . programmed into the first year."<sup>23</sup> The work, often too excessive to complete, generates a feeling of incompetence and leaves time for little else but law school.

Third, because all first-year law students instinctually appreciate the profound importance of their first-year grades to future success, they are so obsessed with grades that the goal of learning becomes almost incidental. To make matters worse, most realize that there is nothing they can do to guarantee their success. More accurately, they never know until it is too late whether they are doing the right thing. They face the ultimate test—the law school exam—without so much as a trial run.<sup>24</sup> Once again, they cannot help but doubt their own capabilities.

Finally, they are spit out of the first year with nothing to show for a year's work but some seemingly arbitrary number stamped on a transcript and the class rank it represents.<sup>25</sup> With the ranking, then, comes "the implicit corollary that place is individually earned, and therefore deserved,"<sup>26</sup> and students internalize the ranking as a reflection of their own self worth.<sup>27</sup>

The one entity of the institution that is best positioned to eliminate these systemic flaws is the administration. In this bleak portrait of the law school, however, the administration subtly does more to reinforce the law student's sense of isolation and helplessness than to alleviate it.

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22. In the upper levels, the curriculum seems more flexible, but certain courses are required and the bulk come with an administration imprimatur of such indispensability that few law students would dare to forego them. In all fairness, the administration is not entirely to blame for propagating the rumors that certain courses that cumulatively comprise the corporate law track are indispensable. The administration, however, by its decision not to dispel those rumors, passively confirms them.

23. Halpern, *supra* note 1, at 388.

24. See Feinman & Feldman, *Pedagogy*, *supra* note 18, at 881, 910-12 (discussing limited value of traditional law exam, especially because of lack of other feedback, and proposing alternative); Motley, *A Foolish Consistency: The Law School Exam*, 10 NOVA L.J. 723 (1986) (critiquing traditional law exam as evaluative tool or learning experience and proposing alternative).

25. See Feinman & Feldman, *Pedagogy*, *supra* note 18, at 881, 918-24 (noting law professors' and students' perception of grades as arbitrary and proposing alternative theory and system of grading); Kennedy, *Hierarchy*, *supra* note 1, at 50 (students perceived "grades as almost totally arbitrary—unrelated to how much you worked, how much you liked the subject, how much you thought you understood going into the exam, and what you thought of the class and the teacher").

26. Kennedy, *Hierarchy*, *supra* note 1, at 51.

27. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 329 (1982); see *infra* notes 101-06 and accompanying text (discussing legitimacy of grades).

The administration is depicted as aloof and insensitive to student needs. There is no student-administration dialogue in the law school. Any communication is vectorial, from administration to student body. Even that communication is trite. The average student's most extended exposure to the administration is a brief orientation speech. Perhaps during that speech, the dean gives a word of advice or a note of encouragement. Perhaps he even makes a preemptive attempt to dismantle barriers by inviting students to voice concerns. But no one remembers what the administration says in its orientation speech; because everyone is too anxious to pay much attention. When, if ever, the invitation is repeated it is often perceived as insincere. Too little, too late.

The critic's picture is not yet complete, for the largest component of the law school—the student body—has not been described. The critical description of that component is no more flattering. Relations among the students are strained at best, outright savage at worst. There is, to be sure, a certain sense of what might be inaptly labelled “comradery.” Most of it is a mephitic comradery of necessity that is overshadowed by competition.<sup>28</sup> Cooperation, competition, and distrust are inseparable in the law school world. “Very few people can combine rivalry for grades, good summer jobs, clerkships, with helping another member of the study group so effectively that he might actually pose a danger.”<sup>29</sup> Even if they could, the solace of comradery evaporates the first time the student is ridiculed by the professor. Amidst howls of laughter,<sup>30</sup> the law student is shocked into the rude realization that it is not “us against them,” but “me against the world.”

That world, according to the harshest critics, is one in which each law student must defeat his classmates, as each is being defeated by the faculty, the administration, and the system. As a result of the combined forces of professorial abuse and mystification, systemic oppression, and administrative apathy, the student becomes “fearful, passive, intellectually uninteresting, and uncreative.”<sup>31</sup> Quite predictably, they contend, the student internalizes, without question, the system of values, attitudes, and morality that legitimates that world.<sup>32</sup>

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28. See Motley, *supra* note 24, at 740-41 (externalities that foster competition stifle capacity to develop meaningful relationships).

29. D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 65 (1983) [hereinafter *LEGAL EDUCATION*].

30. See Kennedy, *Polemic*, *supra* note 15, at 75 (“First year students when acting as a group in class are as cruel if not crueler than the teachers. They howl with glee when one of their number is dismembered.” (footnote omitted)).

31. Halpern, *supra* note 1, at 388.

32. “The student is stripped naked, so to speak, so that he may be remade a lawyer. The



To be sure, some of the criticism is unfair and grossly exaggerated. It is equally certain, however, that there is at least a kernel of truth to each of the charges.<sup>33</sup> It in no way impugns the character or sensitivity of the faculty and administration to concede that there are times when their members are too removed from the pressures of the law school or too engrossed in the intricacies of the law to appreciate the true extent of student anxiety. It is hardly revolutionary to suggest that the system—whether for legitimate reasons or not—does not provide the consistent and immediate feedback that students fresh out of college have grown to expect. And it is beyond debate that the dynamic among law students is marked by a keen sense of competition that necessarily taints whatever sense of comradery might arise.

My purpose here is not to take a position on the accuracy of the worst-case scenario. I leave that judgment to the reader. For now, it is sufficient to observe that there are *some* alienating pressures that could readily be diminished.

## (2) *Dealienation Through Law Review*

Perhaps the law review's most important power lies in its potential to diminish the degree of student alienation in the law school. That dealienating potential has both "negative" and "affirmative" components. The law review could in some respects negate or diminish the power of the faculty and administration vis-à-vis students, thereby diminishing their capacity to alienate students. On the other hand, the law review might also affirmatively foster relationships that promote a sense of belonging and comradery.<sup>34</sup>

The following discussion of the law review's dealienating capacity, and particularly the discussion of negative-dealienation through law review, is admittedly simplistic in several respects. Like the worst-case scenario, it treats the relationships between faculty or administration and

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underlying dynamic . . . parallels a highly structured, controlling, emotionally intense initiatory rite used by the church or the military in the indoctrination of their neophytes." *Id.* at 389.

33. The most recent statistical study of the effects of law school verifies that it enhances psychological distress among students. See Benjamin, Kaszniak, Sales & Shanfield, *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 246. The list of symptoms reads like the table of contents to a psychology text: "obsessive-compulsive behavior, interpersonal sensitivity, depression, anxiety, hostility, phobic anxiety, paranoid ideation, and psychoticism (social alienation and isolation)." *Id.*

34. The two overlap. Anything that decreases the power of an aggressor is itself likely to promote a sense of belonging and autonomy, and the formation of strong bonds with others who feel oppressed by common aggressors could itself undermine that threatening power.

students as oppressive, and their respective interests as diametrically opposed. For example, I use the term "oppressive powers" as a convenient shorthand for the alienating *aspects* of the administration-student and faculty-student relationships. Because of its simplification and distortion of the relationship, the discussion that follows also ignores the fact that the law review's development and deployment of any of the powers suggested is likely to trigger an endless and unpredictable chain of reaction and counter-reaction.

As I noted in the discussion of the worst-case scenario, the distortion is not intended to suggest that these relationships are entirely or even largely oppressive. In fact, the relationships are extremely complex and the interests of faculty, administration, and students are undoubtedly more convergent than conflicting. Nor is my purpose to foment revolution, much less to map out a battle plan. I intend only to illustrate some of the options by which law reviews might readily dealienate the law school environment. The extent to which one might advocate adoption of any of the options will turn on the extent to which one accepts the worst-case depiction of law school alienation.

#### a. Negative Dealienation

Insofar as any sense of alienation among students is attributable to a sense of helplessness and lack of control over the oppressive powers, any perceived *weakening* of those powers will necessarily dealienate. Such negative dealienation can be achieved through at least two mechanisms. One mechanism, "withdrawal," is to cordon off a refuge within which the threatening power's influence is diminished. A second mechanism, "confrontation," is to develop an opposing power that provides leverage against the oppressive power.

The law review is a natural spearhead for either mechanism of negative dealienation. It is a refuge—one of the few realms over which neither administration nor faculty exerts direct control. The most important implication of withdrawal is the sense of institutional autonomy it fosters. At least in theory, all the decisions are the students' to make. There are no express agendas dictated from above and no direct restrictions on form or substance. The administration might strongly recommend an article or a topic, but presumably it could never force the law review to accept either. The faculty might criticize the law review's product, but its criticism could never carry with it the humiliation or the personal affront of public, classroom ridicule.

A less powerful implication of the law review's capacity to withdraw lies in its sanctuarial qualities. The law review is a physically and emo-

tionally sheltered environment in which participation is real and voluntary, a stark contrast to the quasi-participation of the law school classroom. The physical insulation also provides an outlet for harmless aggression against the oppressive powers by permitting ridicule to run in the other direction. The law review office is one of the few sites within the law school's boundaries in which it is safe for students to satirize and even slander professors and administrators. To be sure, their public is a limited one. Nevertheless, there is a certain (if superficial) solace in confiding to a fellow student that the professor who chided them to express their thoughts precisely could not write a thought to save his life.

Partially because of the law review's insulation from the direct influence of the law school's oppressive powers and partially by historical accident, the law review also has potentially powerful confrontational weapons against those powers. It is the only law school institution that actually inverts the usual hierarchy rather than merely withdrawing from it.

As against the faculty, the law review has the power to judge.<sup>35</sup> Student judging of professional writing, often the key to faculty tenure, can have serious practical consequences. In no other academic field do students have such control over who publishes and who perishes. "[T]he normal hierarchy is upset for a day and students lord it over teachers."<sup>36</sup> And the teachers do not like it a bit.<sup>37</sup> They complain, somewhat justifiably, that a law student is simply not competent to evaluate legal scholarship.<sup>38</sup> The real complaint, however, has more to do with power than

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35. Course evaluations, in which students are given an opportunity to critique the professor's effectiveness, organization, selection of materials, availability to students, and general worth as a human being, could be another example. But there are serious doubts as to whether all professors take the process seriously, and certainly not all students do.

36. Boyle, *supra* note 6, at 17.

37. See Cramton, *American Law Review*, *supra* note 8, at 7-10 (student-edited law reviews should be abandoned in favor of greater faculty involvement); Mewett, *Reviewing the Law Reviews*, 8 J. LEGAL EDUC. 188, 190 (1955) ("[t]he student has no place on a law review at all"); Murray, *Publish and Perish—By Suffocation*, 27 J. LEGAL EDUC. 566 (1975); Rothstein & Rothstein, *Law Reviews Suffer from Lack of Peer Review*, Legal Times, Jan. 6, 1986, at 10, col. 1; *Faculty Ponders Alternative Journal*, HARV. L. REC., Feb. 10, 1984, at 6; *Harvard's Faculty Stirs a Tempest with Plans for New Law Journal*, Wall St. J., May 28, 1986, at 37, col. 4. But see Kester, *Faculty Participation in the Student-Edited Law Review*, 33 J. LEGAL EDUC. 14 (1986) (faculty provides more guidance than law review members admit).

38. Rothstein & Rothstein, *supra* note 37. Compare Rotunda, *Law Reviews—The Extreme Centrist Position*, 62 IND. L.J. 1, 2 & n.4 (1986) (recounting some classic misjudgments by law review editors such as Harvard Law Review's rejection of Dean Prosser's *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960)) and Cramton, *American Law Review*, *supra* note 8, at 7-8 & nn.30-31 (more horror stories, including faculty intervention to prevent H.L.A. Hart from withdrawing *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958), over editing dispute) with Kester, *supra* note 37, at

with expertise, for any lack of expertise is virtually inconsequential. The true jewels almost inevitably get published somewhere. Even if most of the selections that students publish are no more than "polished turds," the legal community is free to ignore them and delve straight for the jewel in the heap.<sup>39</sup>

The recent emergence of several faculty-edited law reviews is at least partially responsive to the power of the student-run law reviews. There is little danger that the former will replace the latter,<sup>40</sup> however, if for no other reason than that there are not enough faculty-edited law reviews to absorb even a fraction of the law faculty's scholastic inundation.<sup>41</sup> Whether or not they are good at what they do, the students can for the time being feel secure in exercising their considerable power.

As leverage against the administration, the law review can capitalize on the administration's perpetual obsession with its own reputation and the law school's stature, both of which are affected by the perceived quality of the law review. Against both faculty and administration, the law review has a power, no different in kind (although certainly in degree) from that of the press, to influence the faculty's or administration's future conduct. The law review can threaten to expose the oppressive powers to the world.<sup>42</sup> In short, a well-organized law review seems free to make waves, if not demands, with considerable impunity.<sup>43</sup>

It is fair to question exactly how much leverage these unique confrontational powers afford the law review. After all, the proliferation of law reviews limits the potency of a law review's capacity to discriminate among authors. Moreover, it is hard to imagine what damage a law re-

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14-15 (counter-examples including faculty's opposition to publication of Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673 (1963)). Some doubt law students' competence to perform even the most primitive editorial functions of "warrant[ing] that citations are in the correct citation form; that the spelling, grammar and punctuation are correct; that citations and quotes are correct; that cases have been Shepardized for currency; that statements are substantively accurate; that the coverage is thorough; and that the reasoning is sound." Rothstein & Rothstein, *supra* note 37.

39. See Rotunda, *supra* note 38, at 7-9. I have expropriated the term "polished turds" from a prominent judge who shall remain nameless.

40. *Id.* at 6-7 & n.19. But cf. Cramton, *American Law Review*, *supra* note 8, at 10 (while law review is currently secure, it has doubtful future).

41. See Ellman, *A Comparison of Law Faculty Production in Leading Law Reviews*, 33 J. LEGAL EDUC. 681, 682 (1983) (surveying 1286 faculty pieces published in student-edited law reviews in two and one-half year period, which occupied 44,411 pages and 175,415 footnotes).

42. Other student-run entities, and even ad hoc groups of students, could also publicize the acts of faculty and administration to their embarrassment, but no other student entity has the law review's pre-existing apparatus or ready-made audience.

43. While other student entities might organize and make demands, they have less leverage. Organization of a student boycott or strike, for example, is hardly a credible threat.

view could inflict on the institutional reputation that would not also rebound to the law review's detriment.

There are several responses. In the first place, neither of these limitations diminishes the law review's single greatest weapon, the combined power of the press and access to an audience. Second, even if these qualifications weaken the potency of the weapon they do not negate it entirely. The power to select articles is still worth something as against the many law professors who submit to affiliated law reviews;<sup>44</sup> the power to tarnish the administration's or even the school's stature is still worth something, when to do so would not also harm the law review. Third, neither limitation is inevitable or insurmountable. For example, the apparent limitation to the article-selection power depends on the provincial assumption that law reviews are confined to their own little law school communities. There is nothing in theory to prevent various law reviews from coordinating article-selection efforts, thereby increasing the leverage of each. Finally, quite apart from the strength of the suggested powers, their very existence fosters a feeling of greater autonomy. The knowledge that one can diminish, however imperceptibly, the power of a dominating force is itself dealienating.

b. Affirmative Dealienation

In contrast to the negative mechanisms of dealienation, affirmative dealienation can be accomplished without reference to administration or faculty powers, because its purpose is not to diminish the power of either group vis-à-vis the student body. Rather, it is aimed at independently promoting among students a sense of self-worth and belonging in what might otherwise be (and in the worst-case scenario is sure to be) a demoralizing and impersonal experience.

Again, the law review is, in conception, well suited to the task. It is the most truly communal activity in the law school environment, an activity that could foster comradeship rather than competition among students.<sup>45</sup> In order to publish a decent product, the members have no

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44. According to a recent study, the major law reviews publish disproportionately the work of affiliated faculty. Ellman, *supra* note 41, at 692. The most dramatic example was the University of Virginia faculty, which in a two and one-half year period collectively published 1323 of 1926 pages in the *Virginia Law Review*. *Id.* at 688-89. A likely explanation (the validity of which the survey could not assess) is that "there is a significant relaxation of normal evaluative procedures for home faculty submissions." *Id.* at 692.

45. Two other candidates are the study group and the clinic. The study group members rely heavily upon one another, but there are almost invariably strong undercurrents of competition. See *supra* notes 28-29 and accompanying text (discussing mutual distrust among law students). The clinic might be more cooperative, but there, too, an undercurrent of competition is likely to exist. After all, everyone gets a grade; they cannot all be A's.

choice but to unite. Distrust need not underlie the cooperation, as it does in other student settings. First, the law review's members are not merely united *against* what might be perceived at times as a common enemy in the classroom. Instead, they must work hard *toward* a common goal: to create a product that bears their names and reflects their collective identity. Second, there is no internal, systemic influence comparable to grades that pits one member against the other. In contrast to the study-group setting, for example, the good of the individual corresponds to the good of the collective.

The creative focus of the law review means that the member has more to show for her work than a few numbers on a computerized transcript. There is a concrete final product that the student may claim as her own. This concretization of the work effort stands in stark contrast to the seeming futility of an endless succession of law school lectures and examinations. Moreover, because so many prominent scholars and jurists say so, the student can truly believe that the product makes a difference.<sup>46</sup>

Finally, evaluation in the ideal law review is done by peers who theoretically are equally concerned with the final product. They are not austere authority figures who are perceived as aloof and abusive. The evaluation is constructive, frequent, and based upon factors that are within the student's control. It is a far cry from the scarcity of feedback and the futility and seeming arbitrariness that may be said to characterize the rest of the law school experience. Ideally, the goal of the law review evaluative process is to perfect a product, not to perpetuate a ranking. The very notion of a ranking should be foreign to the evaluation of students' law review work. Every student submission may be published if it meets the law review's standards of quality. Accordingly, no piece is ever rejected with the finality of a law school grade, and the student author should feel as if she were working with, not against, her law review authority figure.

## B. Creativity and Intellectualism

The law school has been described by some as a downright anti-

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46. See, e.g., Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 228 (1965); Hoffman, *Law Review and the Bench*, 51 NW. L. REV. 17 (1956); Traynor, *To the Right Honorable Law Reviews*, 10 UCLA L. REV. 3 (1962); Warren, *Message of Greeting to the U.C.L.A. Law Review*, 1 UCLA L. REV. 1 (1953); see also Rotunda, *supra* note 38, at 4 n.9 (compiling references on importance of law review scholarship to development of law); Swygert & Bruce, *supra* note 10, at 739 n.5 (same). While some may disagree, it is sufficient for my purposes to note that students are given ample reason to believe that law reviews make valuable contributions.

intellectual environment that stifles creativity—"a three-year stopover (lightened by one or two lucrative summer associateships) on the way to a big-dollar business rather than an intellectual introduction to a profession."<sup>47</sup> These characteristics both exacerbate and reflect the student alienation just described. To the extent that law school suppresses students' creativity and relegates intellectual pursuits to a position of incidental importance, students sense a certain futility; to the extent that they find the law school environment oppressive, students are unlikely to make the most of the intellectual and creative opportunities that the law school does offer. Realization of the law review's dealienating potential could incidentally reverse some of the perceived anti-intellectualism of the law school. More importantly, the law review, with its creative and intellectual focus, could directly spur its members' intellectual development.

*(1) Speculations on Anti-creative and Anti-intellectual Forces  
in the Law School*

If the law school is anti-intellectual and creativity-stifling it is not because the incoming students expect it to be. To be sure, many students are uncertain why they are in law school and a good many go by default. Whatever their motives, most undoubtedly expect an intellectual challenge. They expect also to be forced to see things in a new light and to use their ingenuity to seek new solutions to old problems. Like most outsiders, they envision law school as "a place for dialogue, for reflection, for definition and comparison of values."<sup>48</sup> Thus, if the law school is anti-intellectual or if it stifles creativity, that must be because something happens between orientation and graduation. The possibilities include: (1) the emphasis of the credential value of law school over the experience of legal training; (2) the perceived marginality of the law school curricu-

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47. Brill, *Harvard Drivel*, Am. Law., Oct. 1982, at 1, 9; see also *id.* ("students . . . don't care all that much about the education they are getting compared with the credentials they are buying"); Margolick, *The Trouble with America's Law Schools*, N.Y. Times, May 22, 1983, § 6 (Magazine), at 21; Stevens, *Law Schools and Law Students*, 59 VA. L. REV. 551, 553 (1973) ("[T]he popular conception of law school life as a mixture of long hours pouring over casebooks and endless discussion is more myth than reality. By the fifth semester, many students have the equivalent of a two-day work week and discuss their studies rarely, if at all.")

48. Cramton, *Demystifying*, *supra* note 19, at 2 (citation omitted). Cramton continues:

It is a special place, a unique resource. Here there can be gathered a community of scholars with the luxury of time, the support of colleagues, and the devotion to inquiry that are the essential predicate for the development of new ideas and values concerning law, legal institutions, and the never-ending quest for justice.

lum; and (3) the spurning of intellectualism and creativity by those who were disappointed with their first-year performance.

a. Credential vs. Experience

An intellectually enriching experience is not the law students' only expectation. Each is fully aware of the credential value of a law degree that represents for most a personal, and for many a familial, advancement up the social ladder. Of course, the law degree's credential value is not inherently incompatible with a worthwhile intellectual and creative experience. Through three phenomena, however, the credential depreciates the experience. First, over the course of the law school tenure, the credential's value grows increasingly concrete, enticing law students into a competition for prestige. Second, it becomes clear that the credential value of the law degree is roughly proportional to the grade-point average (GPA), so that those who seek prestige become obsessed with grades. Finally, pursuit of prestige through the credential is to some extent systematically incompatible with the pursuit of intellectual experience through law school.

The corporate law firm exerts the most powerful force toward concretization of the law-degree credential. Law firms go to great lengths and expense to recruit the potential recipients of law degrees. The summer program entices law students with a taste of the "good life," replete with cruises and dream nights. Law firms offer salaries that are triple the student's highest pre-law school salary and many times the student's perceived self-worth. With all law firms looking and sounding the same, students compare law firms largely (though, in all fairness, not entirely) on the basis of the salaries, perks, and prestige they offer. The enticement of law-firm prestige convinces students of the value of the credential they are earning; if bidders are willing to pay so high a price for a law school graduate, the theory goes, then the credential must be extraordinarily valuable. Moreover, it becomes apparent that the only really prestigious route is the corporate law firm; otherwise other entities such as public defenders, government agencies, and public-interest firms would be as visible, would offer equally competitive salaries and perks, and would be actively promoted by law school placement offices.

Of course, not everyone gets recruited by law firms and the most prestigious ones only interview a handful of students. The competition is fierce. It becomes clear that the law degree is not the ultimate credential. The prestigious law firms are competing for the top of the class. The more prestigious the firm, the finer the layer of cream they attempt to skim off the top. Grades take on a whole new significance. Some stu-



dents might continue to value grades as a reflection of legal knowledge, but grades are at least as important as a route to prestige. Thus, studying becomes a step toward financial and social advancement in addition to (or instead of) an activity that is inherently worthwhile.

Finally, as the system is arranged, the pursuit of prestige is, as a practical matter, often incompatible with an intellectual and creative experience. Students interrupt or miss classes for on-campus interviews. They miss full days or even weeks of school for fly-backs. The choice to forego class for job opportunities reflects student values: lining up a position with a prestigious law firm is more important than learning the law and far more important than making law study creative. It is not entirely their fault. The system is such that students have virtually no choice but to make the value judgment they make. From the outset, there is strong systemic pressure to seek a position with a high-prestige law firm. The only way to get the job is to play the law firm game. And the only way to play the game right, as the system is arranged, is to miss class for interviews and fly-backs and pass up whatever nominally creative opportunities the law school offers.<sup>49</sup>

The continuing incentive to earn high grades also fails to compensate for the anti-intellectual and creativity-stifling effects of the job search. In the first place, as I demonstrate later, the grade-point average is a poor measure of legal knowledge.<sup>50</sup> There is, then, a sense in which the time and energy spent earning high grades displace "true" scholarship. Even the assumption that grades can accurately reflect legal proficiency at the time the exam is taken does not necessarily lead to the conclusion that the incentive to earn high grades reinforces intellectualism. The system still encourages the student to accommodate all the demands on his time by interviewing during the term and then cramming for exams at the end. This being the case, there is little chance that proficiency at the time of the exam will translate into long-term proficiency. There is even less chance that preparation for and taking of the exam will be a creative experience.

#### b. Marginality of the Law School Curriculum

Perhaps one reason students are so ready to elevate grades above the law school curriculum is that they perceive the former but not the latter as relevant to the real world. Perhaps they can sense what some com-

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49. It would be easy enough for schools to set aside an interview week so that students do not miss class time. The week could be made up at the end of the school year. Yale Law School and Columbia Law School, for example, have instituted such a practice.

50. See *infra* notes 101-06 and accompanying text.

mentators describe as the "marginality" of the law school curriculum,<sup>51</sup> perceiving the curriculum's predominantly doctrinal and value-neutral focus as mostly beside the point.<sup>52</sup> The pursuit of the "true meaning" of cases and the often senseless search for patterns that explain them may be thought to ignore, and indeed obfuscate, more important issues such as the legitimacy of the doctrine's underlying assumptions.<sup>53</sup> If a particular law student perceives the curriculum as a process of enshrouding the truly relevant issues in doctrinal smog, he is likely to grow impatient with or cynical about what others call intellectualism.<sup>54</sup>

The problem is that upon rejecting legal doctrine, students may have nothing to put in its place. If professors do not discuss and encourage independent consideration of alternative views, and *a fortiori* if they affirmatively discourage such endeavors, the students are left with an intellectual void. In the end, they simply tune out, opting to focus their energies on other endeavors such as part-time work.<sup>55</sup>

### c. Agony of Defeat Among Overachievers

A third possible explanation of the anti-intellectualism that infects law students is the demoralization of students who fail to reach the top of the class. Students who enter law school are accustomed to being at the top. As noted above, they are therefore likely to internalize their grades.<sup>56</sup> Those who do poorly in law school readily attribute their performance to intellectual inferiority, just as they once comfortably attributed their high undergraduate grades to intellectual superiority.<sup>57</sup> The

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51. Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1205 (1981) (making charge of "marginality" against legal scholarship generally); see Halpern, *supra* note 1, at 384-88 (case-law method precludes consideration of fundamental questions); Kennedy, *Hierarchy*, *supra* note 1, at 46-50 (on formal law curriculum).

52. See, e.g., Kairys, *Legal Reasoning*, in THE POLITICS OF LAW, *supra* note 1, at 11; cf. Kennedy, *Liberal Values in Legal Education*, 10 NOVA L.J. 603, 608-10 (1986) [hereinafter Kennedy, *Liberal Values*] (distinguishing between "doctrinal" and "value-neutral" teaching methods).

53. Cf. Cramton, *Professional Education in Medicine and Law: Structural Differences, Common Failings, Possible Opportunities*, 34 CLEV. ST. L. REV. 349, 354 (1986) (describing process by which law curriculum discourages self-learning and intellectual curiosity).

54. See Feinman & Feldman, *Pedagogy*, *supra* note 18, at 878-79 (indeterminacy of law and irrelevance of morality to legal reasoning leave students cynical).

55. Cf. Pipkin, *Moonlighting in Law School: A Multischool Study of Part-Time Employment of Full-Time Students*, 1982 AM. B. FOUND. RES. J. 1109.

56. See *supra* notes 26-27 and accompanying text (discussing internalization of grades).

57. It is common knowledge among law professors that a student's first-year grades will often influence the student's continued class participation. Decreased participation among those with lower grades is most likely traceable to a decline in their perception of their own scholastic worth.

system then reinforces that perception because the jobs that are deemed most desirable are beyond their reach.

The self-perception becomes self-fulfilling. A student who perceives herself as unintellectual and uncreative is unlikely to spend much time doing what the system tells her she does poorly. She is likely to reject intellectual discourse, at least the law school community's brand of it, and focus more on redemption in the legal community once she leaves law school.

## *(2) The Law Review's Intellectual and Creative Potential*

Observers might reasonably disagree as to the intellectual value of the law school experience and the extent to which each of the factors discussed suppresses that value. It cannot be gainsaid, however, that a greater emphasis on the intellectual and creative aspects of legal scholarship would be beneficial. The law review could offer opportunities for such enrichment, less tainted by the forces that undermine it in the law school curriculum.

The law review experience is by nature conducive to both creativity and intellectual discourse. Its function, to produce and disseminate legal scholarship, virtually compels such a focus. Article selection should demand substantive analysis of legal arguments and probing inquiry into the validity of their underlying assumptions. Editing should involve both a painstaking analysis of that substance and a keen sense of style. Scrutinizing the work of others is a useful way to develop one's own writing and analytical skills. The student editor grows sensitive to problems that might otherwise go unnoticed in his own writing. More importantly, he is exposed to a variety of ideas, styles, and subjects that he could integrate into his own work. Finally, the writing program should force students to think creatively and rigorously. Since each activity is conducted by a group with a common goal—the production of the best possible product—all members are theoretically involved at all stages of the intellectual debate and the creative process.

Significantly, the anti-intellectual influences inherent in the law school curriculum could be substantially eliminated from the law review. To the extent that the student writer or editor becomes frustrated by the marginality of legal doctrine, his law review experience can focus on those issues he perceives as relevant. Input from professors could readily be solicited to help fill the void that remains if the student rejects doctrine. And since the law review is not subject to direct professorial control such lines of analysis cannot be effectively discouraged. The student

could be constantly bombarded with the newest ideas as articles from scholars flow in submitted for publication.

Unlike in the formal law school curriculum, the credential value of law review need not undermine its intellectual value. Of course, if the law review experience as described above were open to all students, or made an academic requirement, the law review would have no independent credential value. The students' performance in the activity would be determined largely by their desire to benefit from the experience. There would not be as powerful an incentive to perform for the sake of future advancement or prestige.<sup>58</sup> Rather, the point would be to benefit from the experience for its own intrinsic value.

Even a law review that is exclusive, and therefore more likely to be regarded as a credential, can be structured so that its credential is compatible with a worthwhile intellectual experience. The insulation of law review work from the grading scheme means that once students join law review, they are more likely to engage in the activity for the sake of the experience than for its credential value. Accordingly one might expect law review to be less conducive to the type of competition that grades engender in law school classes. Instead, a close-knit group of students, united by the common goal of putting out the best product possible, can focus entirely on how best to achieve that goal.

The very exclusivity and concomitant credential value of the law review could begin to undo student dejection upon less-than-stellar law school performance. If the law review selection process is based on something other than grades, students who did not perform well on law school exams could redeem themselves while still in law school rather than reserving redemption for post-graduation. Having proven themselves to be intellectually competent in other respects, they could find less reason to spurn intellectual endeavors.

### C. Reactionism and Activism

We have already seen that pursuit of either intellectual stimulation or prestige may motivate the student to go to law school. Most students also come to law school with some sense of mission. They often have

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58. This may not be entirely true. If the law review were purely voluntary, its members would join primarily out of genuine interest in the experience. If, however, the law review experience were a mandatory part of the curriculum, it would most likely be plagued by the same problems that infect every other aspect of the law school curriculum. To subject law review work to grades would divert its members' attention away from legal scholarship, resulting in the same anti-intellectualism that infects law school curriculum generally. To exempt the mandatory law review from grades, however, would encourage students to sacrifice the full experience for the all-important GPA.

aspirations of social and political reform, envisioning the law as something more than a mere profession. Duncan Kennedy identifies two such aspirations: a progressive "service through the law"<sup>59</sup> and a more radical turning of the superstructural tables on those who dominate through law.<sup>60</sup> Just as law students may be disappointed by an anti-intellectual environment, they may also find that law school is less conducive, or even hostile, to social or political action (or their vision of such action) than they anticipated.

Not everyone would characterize all or any such repression<sup>61</sup> as necessarily undesirable. To the extent that it is, however, the law review once again has considerable potential to counter that repression and act affirmatively on political or social issues.

### *(1) Law School Repression and Law Firm Reactionism*

Of course, the law school does not politically repress all students. To the extent that it does, an attempt to posit a single pattern of political repression would be patently simplistic. Nevertheless, two general observations might shed some light on the source of any such repression. The first relates to the law school curriculum's apparent, and apparently false, neutrality and its tendency to indoctrinate. The second is the law school's tendency to funnel its students into the corporate law firm.<sup>62</sup>

#### a. False Neutrality and "Indoctrination"

When the law school pretends to be "barren of theoretical ambition or practical vision of what social life might be,"<sup>63</sup> the neutrality is only superficial. It can scarcely be disputed that law schools are, in fact, extraordinarily political. I have already noted a possible manifestation and a concomitant result of that apparent, but false, neutrality. The manifes-

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59. Kennedy, *Hierarchy*, *supra* note 1, at 41 (attributing notion to Justice Brandeis).

60. See *id.* (in the "more radical notion . . . the student sees herself as part technician, part juro expert, able to turn the tables exactly because she never lets herself be mystified by the rhetoric that is so important to other students"); Garth, *Independent Professional Power and the Search for a Legal Ideology with a Progressive Bite*, 62 *IND. L.J.* 183, 187 (1987) (doctrine can be useful in bringing about progressive or radical agenda because "[l]awyers get listened to in many forums when they can ground their position in accepted legal doctrines").

61. The word "repression" is itself loaded with negative connotations. A better alternative might be "deterrence."

62. This section borrows heavily from Feinman & Feldman, *Pedagogy*, *supra* note 18, at 876-78; Halpern, *supra* note 1, at 386-94; and Kennedy, *Hierarchy*, *supra* note 1, at 41-44, 59-61. They each address the effects discussed here as if they were the inevitable product of the law school. I do not go that far here. Rather, I discuss the effects as possible pitfalls of legal education.

63. Kennedy, *Hierarchy*, *supra* note 1, at 40; cf. Cramton, *Demystifying*, *supra* note 19, at 7 ("Much legal scholarship pretends to an objectivity it does not deliver . . .").

tation is the curriculum's emphasis on doctrine to the exclusion of the fundamental political judgments that underlie it. A potential result is student disillusion with, and wholesale rejection of, the law school curriculum.<sup>64</sup>

The false neutrality could also trigger effects that extend far beyond the classroom. Most obvious is an effect that, for convenience and for lack of a better word with a less negative connotation, can be labeled "indoctrination." First, the law school discourages resort to arguments based upon the student's sense of intuitive morality or justice as not sufficiently developed or authoritative to persuade. Second, since most students believe that legal doctrine reflects some sort of intuitive morality, they may feel comfortable abandoning as naive their view of justice and opting for the view that legal doctrine reflects.

If one accepts the hypothesis that doctrine conceals underlying political judgments, the result of such a disproportionate focus on doctrine is to legitimate the status quo. Of course, a certain measure of doctrine is indispensable, even if the student's sole aspiration is to change that doctrine radically. Facility with doctrine is the very basis of Kennedy's radical table-turning. But the more willing a student is to accept doctrinal analysis as the sole input into the resolution of a legal issue, the more likely he is to abandon his sense of "justice" as a check on the result that doctrine compels, or worse, to rationalize a result that initially struck him as unjust.<sup>65</sup>

In short, the indoctrination threatens to change the way students look at the world. A changed perspective is not inherently undesirable so long as it results from even-handed scrutiny of all relevant positions. The law school indoctrination, however, changes the student's views not by opening her eyes to new ideas, but by narrowing her focus to irrelevancies or, at best, "marginalities." In the end, the more tolerant a student becomes of injustice in the name of the rule of law, the more likely she is to acquiesce in, perhaps even to advance, the very "evils" that she entered law school to change.

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64. This observation might be extrapolated to the law school years generally. Perhaps law students are simply too busy, or perhaps the study of law so legitimates the status quo that the student abandons her thoughts of change. Whatever the reason, law students tend to refrain from participation in either community or law school politics.

65. Cramton's observations on legal scholarship are readily adaptable to legal education:

Proposals for reform in traditional legal scholarship are limited and meliorist, since they take present arrangements for granted. Although rarely stated, the tacit assumption is that our system (minor blemishes aside) is as good as it is reasonable to expect a civilized society to have become at this stage of human history.

Cramton, *Demystifying*, *supra* note 19, at 11.

b. The Law School and Law Firm Reactionism

If there is any truth to the foregoing discussion of law student indoctrination it can begin to explain both the law student's eagerness to join the corporate law firm and her complacency once there.<sup>66</sup> Imagine that the law student who once contemplated service through law or radical inversion of hierarchies becomes convinced, through indoctrination or otherwise, that the world is indeed as just as it can be. She will feel satisfied to abandon her earlier visions of social and political change for a more lucrative and prestigious position with a law firm.

In fact, the student need not abandon "service through the law" as a guiding aspiration. That aspiration, as redefined, might be compatible, indeed synonymous, with law firm practice. If "service through the law" means furthering one's sense of justice, then a student who perceives the status quo as just may feel compelled to preserve it. Reaction to that perception could mean joining forces with an institution, like the corporate law firm, that is itself firmly rooted in the status quo, if not down-right reactionary.

Other pressures, both within and without the law school, also steer the student in the corporate law firm's direction. The external pressures stem from the opulence and prestige associated with the law firm. As noted earlier, even a student motivated by neither could easily convince herself that the money and prestige reflect the inherent worthiness of law firm practice as a career option.

The law school reinforces—some say, practically necessitates—that conclusion in three ways.<sup>67</sup> First, intentionally or not, it conveys an implicit message that law firm practice is the most desirable career option. Its placement office concentrates most of its efforts on law firm interviews, offering little guidance on other alternatives. Its curriculum has a decidedly corporate bent. Second, the prevailing law school culture teaches the student to associate the megafirm with success, since that is where the prestige, power, and money are.

Third, law school simply does not prepare students to be much more than apprentices in the law firm hierarchy.<sup>68</sup> New graduates are not

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66. See generally Kagan & Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399 (1985) (discussing images of large firm practice and hypotheses on how it is changing).

67. See Foster, *supra* note 1, at 178, 185 (law school trains students to adjust behavior to requirements of stratified job market; "doing *any* sort of law can begin to take precedence over pursuing employment in tune with one's largely irrelevant service-oriented aspirations") (emphasis in original); Kennedy, *Polemic*, *supra* note 15, at 81-82. See generally *supra* note 62 (citing articles that discuss funneling of law students into law firm).

68. Judge Bazelon made a similar observation in discussing the quality of legal represen-

ready, at least not by virtue of anything law school has taught them, to open up shop on their own.<sup>69</sup> Nor do they have much to offer public-interest or government employers, which reserve most of their positions for more experienced graduates. The explanations for the inadequacy of legal training are varied, but the apologists for the law school curriculum have at least two. Some maintain that the law school's emphasis is intentional: law school's objective is not to teach students technical skills, which are readily acquired in practice, but to instill in them a certain method of "thinking like a lawyer," which is not.<sup>70</sup> Others blame the

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tation in criminal cases: "Law schools do not teach students how to try criminal cases. . . . Unlike his Wall Street counterpart, whose firm provides a closely supervised apprenticeship period, the neophyte criminal lawyer is not apt to find such on-the-job training programs." Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 13-14 (1973).

69. Jay Feinman points out that:

no knowledgeable observer would argue that on graduation day the great majority of law school graduates are well-equipped to enter the practice of law possessing a satisfactory base of theoretical and technical knowledge, professional skill, and the ability to quickly and effectively acquire other knowledge and skills as needed.

Feinman, *Failure*, *supra* note 1, at 740-41 (footnote omitted); see also Committee to Consider Standards for Admission to Practice in the Federal Courts, *Final Report to the Judicial Conference of the United States*, 83 F.R.D. 215, 219 (1979) (nearly 300 federal district court judges surveyed rated 25% of lawyers less than "good"); Lederman & Levenson, *Dealing with the Limits of Vision: The Planning Process and the Education of Lawyers*, 62 N.Y.U. L. REV. 404, 404 (1987); Meltsner, *Healing the Breach: Harmonizing Legal Practice and Education*, 11 VT. L. REV. 377 (1986) (discussing shortcomings of legal education and Vermont Law School's new program to rectify); see generally ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 3 (1979) ("recommendations . . . designed to improve the quality of law school training for the profession"); F. ZEMANS & V. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION 132-33 (1981) ("Although formal law school training is the virtual prerequisite for admission to the bar, it is an open question just how much and in what ways it prepares its graduates for practice."); Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEGAL EDUC. 264 (1978) (statistical analysis demonstrates that law school graduates commonly believe that aspects of their training were inadequate).

70. David Cavers described lawyerly thinking as an "insight . . . into the way legal problems arise and the processes by which lawyers and courts and legislatures have been seeking to solve them." Cavers, *Legal Education in the United States*, in TALKS ON AMERICAN LAW 193 (H. Berman ed. 1961). Derek Bok, in a highly controversial indictment of the American law school, criticized the thinking-like-a-lawyer rationale:

[O]ne can admire the virtues of careful analysis and still believe that the times cry out for more than these traditional skills. . . . [T]he capacity to think like a lawyer has produced many triumphs, but it has also helped to produce a legal system that is among the most expensive and least efficient in the world.

Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570, 582 (1983); accord Feinman, *Failure*, *supra* note 1, at 741 (critical of explanation that law schools designed only to "provide fundamental knowledge about legal doctrines and institutions" and that "the rest of what lawyers do—whether regarded as significant or derided as 'how to find the courthouse'—can be acquired in the course of practice."); Mudd, *Thinking Critically About "Thinking Like a Lawyer"*, 33 J. LEGAL EDUC. 704 (1983).



failure on the students: "[l]aw schools do not fail to teach, . . . students fail to learn."<sup>71</sup> More cynical commentators trace the phenomenon in part to the historical interdependence of the law school and the law firm,<sup>72</sup> and in part to the long-standing institutional schism between legal educators and legal practice.<sup>73</sup>

So far, I have discussed the funneling of law students into the corporate law firm as a *manifestation* of the law school's political repression of students. Accordingly, the objections discussed have targeted not the result but the process. This process is objectionable to the extent that the student's decision to join the ranks of the corporate law firm is contaminated by indoctrination or societal and institutional pressures, or is traceable to incompetence or inability to choose otherwise.

Quite apart from the procedural taint, many observers find the result itself objectionable.<sup>74</sup> If the law school has not duped a particular student—or does not ordinarily dupe students—into abandoning the ideals of public service or political action, some commentators protest that the law firm will likely succeed in doing so.<sup>75</sup> The law firm reverses the young lawyer's aspirations of political reform by placing him in an environment that is itself reactionary.<sup>76</sup> Affiliation with a law firm mutes opposition to the system that supports it.<sup>77</sup> At the very least, the law firm tends to crowd out those goals by pressuring the associate to bill so

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71. See Feinman, *Failure*, *supra* note 1, at 743 (criticizing that view as "a typical ploy—blaming the victims").

72. The symbiotic relationship is described basically as follows: The law school needs the big-name law firm to establish its own prestige. The law firm needs the law school to funnel students to its offices. Thus, the law school trains students to be (and to realize they are) technically and emotionally unprepared for anything but law firm practice. In return the law firm makes the law school prestigious by hiring its graduates.

On the historical integration of law school into the network of corporate and financial power, see Chase, *Lawyer Training in the Age of the Department Store*, 78 NW. L. REV. 893, 898 n.16 (1979) (reviewing R. STEVENS, *supra* note 1).

73. Chief Justice Rehnquist, by no means a radical left-winger, has wondered about the schism: "Law school faculties have preferred to devote themselves, by and large, to criticism and analysis of legal doctrine . . . . But one wonders whether some of the emphasis of law school study and research might not profitably be shifted to the broad area of how legal services are delivered . . . ." Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 152 (1987). Feinman explains the phenomenon and its historical sources at length. See Feinman, *Failure*, *supra* note 1, at 744-47. He blames the poor quality of legal education on the historical lack of a constituency for quality education. "The law school provides profit and prestige for the university, but the quality of education it delivers is largely irrelevant to the amount of profit or prestige it receives. From the law faculty's perspective, personal and professional prestige are, for the most part, unrelated to the performance of graduates." *Id.* at 747.

74. See, e.g., D. KENNEDY, *LEGAL EDUCATION*, *supra* note 29, at 70-71, 78-80.

75. *Id.* at 69-70.

76. *Id.*

77. See Cramton, *Demystifying*, *supra* note 19, at 12 ("It is . . . natural for lawyers not to

many hours that she has no time to pursue anything else.<sup>78</sup>

My caveat to the other criticisms of the law school applies equally here. It is not my intention to take a definitive position on the extent to which the law school and the law firm repress those political and social aspirations that might have motivated the student to enter law school. I note only, as I have previously, that there is a certain amount of truth to the charges of repression.

## (2) *The Law Review as Political Actor*

The law review's every action, like those of the law school institution generally, is infused with political significance. Its acquiescence in the law school's politically repressive tendencies and its failure to take affirmative political action reinforce that repression. Like the law review's dealienating potential, its power to counter political repression has "negative" and "affirmative" elements.

### a. Negative Elements: Deprograming and Disrupting the Funnel

One way to promote activism is to counter those factors in the law school that repress it. I have already noted how the law review may encourage perspectives that diverge from the law school curriculum, thereby militating against the anti-intellectual effect of the law school experience. To the extent that the law school curriculum indoctrinates by narrowing the focus to irrelevancies or "marginalities," the law review could reverse—in essence, "deprogram"<sup>79</sup>—that effect by fostering new ideas and emphasizing the fundamental judgments on which doctrine is based.

If law school indoctrination funnels law students into the law firm by changing their perception of "service through the law," the law review's deprogramming effects could incidentally disrupt that funneling

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raise fundamental questions about the justice of the system that provides them with relative prestige and wealth."); Halpern, *supra* note 1, at 390.

78. Chief Justice Rehnquist, alluding to this phenomenon, queried, "Does such an associate have time to be *anything but* an associate lawyer in that large firm?" Rehnquist, *supra* note 73, at 153 (emphasis in original).

At the time I practiced law there was always a public aspect to the profession, and most lawyers . . . felt that they could contribute something to the community in which they lived . . . It seems to me that the law firm that requires an associate to bill in excess of two thousand hours per year . . . sharply curtail[s] the productive expenditure of energy outside of work.

*Id.*

79. Like the word "indoctrination," I use "deprogram" for lack of an equally descriptive word with less derogatory connotations.

process. But the law review could do even more to disrupt that funneling actively.

First, the law review editorial board is well-situated to spread a double message to its members: (1) the mere fact that law firms are the only path that the law school promotes does not make it the most desirable, and (2) law firm opulence and prestige do not accurately reflect the inherent worthiness of a law firm career. Of course, the law review leaders would have to learn that dual message before they conveyed it. This would not be too difficult. The law review has at its disposal a list of alumni, dating back to volume one. It could readily tap that considerable source of insight into various career options. Once individual law review members begin to act on that message and take alternate career paths, the message will become more powerful; actions, after all, speak louder than words. More importantly, the message could become unnecessary. As more top students opt out of the law firm track, its prestige will decline.

Second, the law review could attempt to prepare students for something other than the law firm apprenticeship. Certainly the law review could do more than merely teach students to "think like a lawyer." Most obviously, it could hone technical research and writing skills that are essential to practice. Moreover, there is nothing that restricts law reviews to those skills that are involved in the publication process. They could easily direct some of their attention to such skills as negotiation, advocacy, and even the routine details of law practice.

#### b. Affirmative Elements: Law Review Activism

In addition to negating specifically whatever politically repressive forces might exist in the law school experience, the law review could be a formidable political actor. Those same confrontational powers that it theoretically could deploy against law school alienation—its anti-hierarchical power over faculty and administration and its power of the press—can be directed toward the corporate law firm. The law firm heavily woos and depends on the law review to staff its offices. Just as the law review can convert faculty and administration dependence into law review leverage, it can, independently or in collusion with other law reviews, convert law firm dependence into leverage. Just as the law review can undermine administration and faculty prestige through publication, it can publicize the shortcomings of particular law firms. While deployment of all these weapons may not be necessary or even advisable, the threat of their use affords the law review much clout.

The law review is not confined to the ivory tower. Legitimately or

not, it is the most prestigious and probably the largest student group in the law school. It can make demands. It can advocate particular political positions or social reform.<sup>80</sup>

## II. Preconceptions of Law Review

The law review's failure to fulfill its potential as a dealienating, intellectually and creatively stimulating, and politically active institution is at least partially attributable to its members' minimal expectations of the institution. The preconceptions form perhaps even before the student enters law school. At any rate, they harden in the course of the first year. While students' experiences vary widely and perceptions of even identical experiences differ, there are certain messages about law review that practically all receive.

### A. The Pre-Law School Preconceptions

The negation of the law review's latent strength begins, for many students, even before they open their casebooks to read *Pennoyer v. Neff*.<sup>81</sup> While law school administrations typically describe the law review to prospective applicants in the murkiest of terms, two themes invariably emerge in law school bulletins: experience and credential.<sup>82</sup> They are often so inextricably intertwined that the casual reader can easily miss their incompatibility.

Invariably, the bulletins underscore the academic benefit and pride that law review experience fosters. At the same time, they hint at its prestige and material value. The law review is billed as "one of the finest avenues for legal education thus far developed."<sup>83</sup> It hones the student's legal analysis, research, and writing skills.<sup>84</sup> Law reviews purport to

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80. Cf. Garth, *supra* note 60 (discussing ways in which legal profession as a whole can effect progressive reform).

81. 95 U.S. 714 (1877).

82. I do not pretend to have performed a systematic survey of law school bulletins; I merely chose forty law school bulletins randomly from the first part of the alphabet. Every level of prestige is represented. The themes discussed below appeared in nearly every bulletin. The only theme that seemed to be affiliated with a particular level of prestige was the theme—which typically appeared only among the newer or less prestigious law schools—that the law review enhances the school's credibility or stature.

83. ARIZONA STATE UNIV. COLLEGE OF LAW, THE STUDY OF LAW: 1984-86 BULLETIN 21 [hereinafter ARIZONA STATE BULLETIN].

84. See BROOKLYN LAW SCHOOL 1985-86 BULLETIN 56 ("unparalleled opportunity to refine legal research and writing skills"); 1985-86 BENJAMIN N. CARDOZO SCHOOL OF LAW BULLETIN 13 ("intensive development of . . . editorial, research, and writing skills"); 1984-86 COLUMBIA UNIV. BULLETIN: SCHOOL OF LAW 99 [hereinafter COLUMBIA BULLETIN] (develop "skills of scholarly research and writing"); CORNELL UNIV. ANNOUNCEMENTS: COR-

complement substantive study by affording the student an opportunity to "perfect knowledge . . . acquired in coursework."<sup>85</sup> Others even promise to enhance managerial skills.<sup>86</sup> But law review is not just a job, it's an adventure.<sup>87</sup> While the law review "requires dedication and discipline,"<sup>88</sup> the experience is "rewarding"<sup>89</sup> and will be "valuable in any future career."<sup>90</sup> The student can have the satisfaction of having contributed to legal scholarship.<sup>91</sup> Furthermore, the entire legal community recognizes law review as a valuable experience<sup>92</sup> and prospective employers put a premium on that experience.<sup>93</sup> In short, law review helps you "be all that you can be."

"Sounds great," the prospective applicant thinks, "where do I sign up?" The catch is that this valuable experience—which the applicant has just been told is not only the best avenue for developing skills that are "essential in both law school and in practice,"<sup>94</sup> but is an integral "part of the educational program of the Law School"<sup>95</sup>—is reserved only for a select few. It's not just an adventure, it's a trophy. "Selection for partici-

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NELL LAW SCHOOL 1985-86 30 (June 1985) [hereinafter CORNELL BULLETIN] ("training and experience in legal research, critical analysis, and concise writing").

85. 1985-86 BOSTON COLLEGE LAW SCHOOL BULLETIN 18 [hereinafter BOSTON COLLEGE BULLETIN].

86. See 1986 COOLEY 52 [hereinafter COOLEY BULLETIN] (28-member law review develops "management skills necessary to run a large organization").

87. The analogy of law review "propaganda" to army advertising is irresistible. Reading the bulletin descriptions, one can almost hear the electric riffs of the bass, working up to a frenzied guitar crescendo, an overdubbed, overmechanical voice dictating: "Port of call, *Po-dunk Law Review*." Alternating images of eager, young scholars charging toward truth and justice and serene moments of comradery flash before the eyes.

88. UNIV. OF CALIFORNIA 1985-86: SCHOOL OF LAW, BOALT HALL 13 (Aug. 1985). This is the closest that any surveyed bulletin came to divulging that law review membership entails long hours and hard work. Certainly none of them gave an inkling that the work might be perceived as dull and devoid of intellectual value. The revelation is reserved for much later, once the law student has already been "invited" to join. See *infra* notes 124-30 and accompanying text (discussing possible function of invitation letters).

89. ARIZONA STATE BULLETIN, *supra* note 83, at 21.

90. CASE WESTERN RESERVE UNIV. SCHOOL OF LAW BULLETIN 20 (July 1985).

91. See, e.g., ARIZONA STATE BULLETIN, *supra* note 83, at 21 ("contributes . . . to the development of law and the legal profession"); BOSTON COLLEGE BULLETIN, *supra* note 85, at 18 ("publish . . . for the benefit of the profession"); 21 CLEVELAND STATE UNIV. BULLETIN: CLEVELAND-MARSHALL COLLEGE OF LAW 72 (July 1985) ("contribute to the legal community by writing a scholarly article").

92. See THE AMERICAN UNIV., THE WASHINGTON COLLEGE OF LAW BULLETIN 111 (Sept. 1986) ("membership on the staff of the *Law Review* is recognized in the legal profession as . . . a unique educational experience").

93. BULLETIN OF BAYLOR UNIV.: THE SCHOOL OF LAW [hereinafter BAYLOR BULLETIN] 15 (May 1985) ("usually considered by prospective employers to be an important factor in the selection of graduates for employment").

94. CORNELL BULLETIN, *supra* note 84, at 30.

95. See COLUMBIA BULLETIN, *supra* note 84, at 99.

pation on the Review," the applicant is told, "is highly competitive."<sup>96</sup> The law review laurels, reserved for "exceptional students,"<sup>97</sup> "a coveted recognition of academic achievement, is one of the highest honors a student can attain."<sup>98</sup> The selection process for that high honor is described cursorily, if at all.

I do not intend to overstate the relevance of this composite description of the law review. In the first place, inferences drawn from such cursory statements of purpose are weak and inferences drawn from omissions are dubious. Moreover, few prospective law students read the descriptions critically; no one reads them as critically as does the discussion that follows. The bulletins may have less impact on the student's expectations of law review than my discussion here might suggest. Nevertheless, we may consider them official pronouncements of the law review's role. It is safe to assume that the same positions are communicated to students through other media as well.

Even with these caveats in mind, the preliminary depiction of the law review suggests that it is not immune from the severest criticisms of the law school. Most obvious is the foreshadowing of two interrelated themes—the credential-experience dialectic and evaluative falsity—that as we already seen might be responsible, respectively, for alienation and anti-intellectualism in the law school. More subtle is an unspoken message that the law review is as much a conservative political actor as is the law school generally.

*(1) The Inherent Tension: Credential-Experience Dialectic and Evaluative Falsity*

The first clue that something is amiss with the bulletin's depiction of the law review is the manner in which it juxtaposes the experience and credential values of the law review. As I have already noted, the same activity could quite plausibly be both a legitimate credential and a worthwhile experience. In the bulletin's description of the law review, those elements are in subtle tension. On the one hand, the bulletins tout law review experience as highly beneficial, if not essential, to legal practice and scholarship. On the other hand, the experience is reserved only to

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96. 81 BRIGHAM YOUNG UNIV. BULLETIN: J. REUBIN CLARK LAW SCHOOL 21 (Aug. 1984).

97. BAYLOR BULLETIN, *supra* note 93, at 15; see COOLEY BULLETIN, *supra* note 86, at 52 ("outstanding students"); 44 IIT CHICAGO—KENT COLLEGE OF LAW, 1985-86 BULLETIN 69 ("students of high scholastic ability"; "selected students").

98. NORTHERN KENTUCKY UNIV. CHASE COLLEGE OF LAW, 1985-86 CATALOG 20 (Sept. 1984).

those who have already demonstrated an exceptional mastery of legal skills.

The tension between the credential and the experiential values of law review is not irreconcilable. Yet to assume that one value is true leads to a problem that can be solved only by either rejecting the other or accepting unpalatable conclusions about the nature of the law school experience.

We can begin with the assumption that the law review experience enhances skills that are essential to legal practice and scholarship. Given that assumption, two explanations for the law review's exclusivity come to mind. First, the lawyering skills on which law review *selection* is based are different from those that the law review *experience* enhances. To appreciate the consequences of this explanation, we must recall that the bulletins characterize the skills that law review experience enhances as essential to legal practice and scholarship, and depict the law review experience as encompassing practically every skill imaginably associated with those pursuits. If these characterizations are accurate, law review selection must be based on criteria that have little to do with lawyering skills, and the credential must be false. Those who are deprived of the credential, and concomitant experience, should feel cheated, alienated; and those who win it should rightfully doubt their own competence.

The second explanation for the law review's exclusivity is equally unsatisfactory. Perhaps law review selection is based on skills of the type that law review experience enhances, but it singles out only those exceptional students for whom the law review experience would be worthwhile. That solution is an effective concession that the law school experience itself (or at least the first year) is a dismal failure, for it leaves most students so incompetent that they could not even benefit from a program designed to enhance the skills most essential to legal practice and scholarship. The message is one of futility, and the likely result, again, is alienation.

The alternative to either of those explanations is to abandon altogether the assumption that law review experience is relevant to legal practice or scholarship. Assuming instead that the law review selection process merely identifies students with superior legal abilities, the implications are no more palatable. It follows that law review membership is nothing more than a credential. As was true in the context of the law school generally, and as will be discussed in more detail in the next section, the law review's credential value is enhanced only at the expense of its intellectual and uncreative direction.

## (2) *The Silent Message*

So far, I have focused only on inferences to be drawn from what bulletins expressly state. Their silence is nearly as eloquent. First, they say little about the law review's political impact. Law review is described as a contributor to legal scholarship, but the nature of that contribution is left to speculation. The bulletin's failure to distinguish law review scholarship from that which prevails in the law school curriculum suggests that they are the same. To the extent that the latter is falsely neutral, the former is likely to be as well. Far from deprogramming whatever indoctrination the law school curriculum engenders, law review participation, as depicted in the bulletins, will enhance it.

Nor do the cursory descriptions of law review evince any tendency to divorce the law school from the corporate law firm. Perhaps the law review's promise to develop lawyering skills will make it easier to resist the corporate law firm funneling, at least to the extent that the funneling is attributable to the students' incompetence to do anything else. The bulletins, however, mention no other alternatives, much less a promise to cultivate them.

Finally, the bulletins are utterly devoid of any reference to the political action that the law review is so well-situated to take. As described, the law review's realm is the ivory tower, not the political arena.

### **B. The First Year: Predominance and Legitimation of the Law Review Credential**

As the foregoing discussion suggests, the characterization of the law review as *both* a worthwhile experience and a valid credential produces a subtle tension. While the bulletin posed the contradiction, it provided no basis on which to elect between those two options, or to adopt some alternative solution. The first year of law school furnishes at least a partial answer: Although most first-year students undoubtedly still assume that the law review is a worthwhile experience, the credential value predominates in their minds and is primarily legitimated. The subordination of the experience theme to the credential and the concurrent legitimation of the credential nearly to the point of unassailability constitute the first step toward undermining the law review's potential.

In part because of the first-year student's academic and social isolation from her predecessors, the law review is partially enshrouded. The sole aspect of law review that is clearly visible during the first year is the success it symbolizes, the goal to which all can aspire and over which all



agonize.<sup>99</sup> It is easy to see and appreciate the practical implications of the law review trophy—easier access to better jobs, separatism, and favoritism.

On the other hand, few students have any idea of what law review work entails or that law review entails work at all. Nor does it seem to matter. Perhaps they blindly accept the assertion that law reviews sharpen essential skills. More likely, however, is that the credential value of law review is broadcast so forcefully that the theme of law review as an experience is drowned out and falls into desuetude.

The first year is the law review credential's best shot at legitimation. For a full year, the law student can view the law review-dominated hierarchy of upperclass students from a disinterested perspective. The first-year student, unlike his counterparts in the second and third years, is not competing with the law review members for prestige. Accordingly, there is no reason to be critical of the hierarchy's legitimacy. He competes, rather, only with other first-year students, who are on seemingly equal footing; each one ostensibly has an equal shot at the prize.

Two factors further reinforce the putative meritocracy's legitimacy: the identification of law review membership with accomplished scholarship and the reward of law review membership. Consistently, those who are considered accomplished scholars are affiliated with the law review. The law fellows for first-year legal writing courses and moot court judges are, more often than not, on a law review. Nearly all of the professors were members in their day (or were, according to the gossip, such accomplished scholars that they had the gumption to turn down law review membership). The law school conveys an unspoken message: those who have won the prize are smarter.

The student also learns early that the system recognizes the elite status of the law review member by rewarding her. The new law student recognizes that law review members are treated somewhat differently. As the year progresses, the separatism manifests itself concretely, if subtly, in the perks that accrue exclusively to the law review personnel: offices, free coffee, message service, and special library privileges. If anything is obvious to the prestige-conscious law student, it is that the prestigious law firms hire from the ranks of the law review. There is,

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99. See D. KENNEDY, *LEGAL EDUCATION*, *supra* note 29, at 65 (describing law review obsession: "most students give about equal time to fantasies of flunking out and fantasies of grabbing the brass ring."); Aronds, *Section 8*, L. Weekly, Mar. 3, 1986, at 10, col. 3 (first-year student depicts panic-stricken cartoon character who worries, "My grades are terrible compared with my past achievements. Already, Law Review is becoming a distant dream.").

then, a corollary message that the system is rewarding law review membership because it merits reward.

When that double message is explicit, it is all the more powerful. The official imprimatur is applied, often unintentionally, by a professor in an offhand remark regarding the value of the law review or the intelligence of its members. Students who latch on to the professor's every word take that assessment as gospel too.

That law review members are recognized as scholars and showered with rewards is of course perfectly consistent with the conclusion that law review accurately selects the scholars and legitimately rewards them. It is, however, equally consistent with the more cynical conclusion that the law review randomly selects members—some intellectuals and some imbecils—all of whom are assumed to be scholars and worthy of reward. Yet it is the rare first year law student who will wonder whether it is the scholars that make law review or the law review that makes scholars—or, more bluntly, whether the system rewards those who really have achieved or merely licenses future achievement by randomly selecting students to reward.

The subordination of the law review experience to the law review credential value and the concurrent legitimation of the latter undermine the law review's potential in two main respects. First, the student who believes that law review membership signifies little more than a credential will expect from it little in the way of intellectual or creative stimulation; law review membership will be an end only. That diminished expectation is likely to mold reality. The student who expects less of law review might do less to make it a worthwhile experience. He will certainly be less disappointed when the law review does not deliver the experience that the bulletin expressly promises. In short, since for a full year he was not promised a challenging and stimulating experience, he neither expects nor demands one when he gets there.

Second, the law student who internalizes the legitimacy of the selection process might easily believe himself to have *earned* the credential. Since for a year there has been little mention of the work that the credential entails, that student is likely to be recalcitrant, even indignant, when asked to pay for it.

### III. The First Deep, Dark Secret: A False Credential

By the time the selection process begins, the meritocracy's legitimacy is so well established that few first-year students dare to question it. Yet to conclude that the first year legitimates the law review meritocracy

in the minds of law students is not to suggest that the consequent hierarchy is in fact legitimate.

At the risk of needlessly needling, I will start by restating the law review's first deep, dark secret: You don't have to be that smart to be on the law review—the credential is false. It is perhaps the deeper and darker of the two law review secrets because, for reasons already discussed, no one seems to realize it, not even the members.

Tautologically, an ideal selection process identifies those who can best perform the skills that they are purportedly selected to perform. In the law review context, the legitimacy of the selection process and of the credential it generates presumably depends on the extent to which the process accurately identifies effective research skills, incisive legal reasoning, persuasive advocacy, and originality.

A survey of law review selection processes discloses three basic avenues to the prize: (1) "grading-on," usually on the basis of first-year grades; (2) "writing-on," through a one- to six-week writing competition; and (3) "publishing-on," the submission and acceptance for publication of a student note.<sup>100</sup> The first two are ill-suited to the selection task, and the third is so rarely employed that its effect on membership is negligible.

### A. Grades

The "main" law review in about half the law schools relies, at least partially, on grades for law review selection.<sup>101</sup> For an institution that purports to be dedicated to scholarly *writing*, this focus on grades is, to say the least, enigmatic. As I have already noted, the law school grading

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100. See generally Fidler, *supra* note 9, at 52-54 (survey of selection processes); *Wisconsin Law Review*, Survey of Law Review Selection (1981) (unpublished manuscript). Criteria conspicuously absent from the selection processes of most law reviews are race, ethnicity, and sex. A handful of law reviews have adopted various affirmative action plans. See Fidler, *supra* note 9, at 53 (eight law reviews, or 6.3% of those surveyed, had affirmative action programs). They have invariably been controversial. See, e.g., Cramton, *American Law Review*, *supra* note 8, at 6-7 (describing *Harvard Law Review's* affirmative action plan as the "fall of the citadel"); Wash. Post, Mar. 3, 1987, at A22, col. 4 (letter to editor defending *Virginia Law Review* plan); Raspberry, *Affirmative Action that Hurts Blacks*, Wash. Post, Feb. 23, 1987, at A11, col. 4 (op-ed attacking *Virginia* affirmative action plan); N.Y. Times, Mar. 22, 1981, at A18, col. 3 (letter to editor supporting *Harvard Law Review* affirmative action plan: "Rather than bemoan the loss of tradition, we should re-examine the basis for analyzing law school graduates seeking employment to allow for fairer evaluation and utilization of skilled lawyers."); N.Y. Times, Mar. 9, 1981, at A22, col. 3 (letter to editor on *Harvard* plan: "should be applauded as a step toward breaking down the sexual and racial barriers that exist in our legal system today"); *Drawing Distinctions at Harvard Law Review*, N.Y. Times, Mar. 3, 1981, at A18, col. 1 (editorial critical of *Harvard* plan); *Harvard Law Review's Ethnic Screening Criticized*, N.Y. Times, Feb. 24, 1981, at A12, col. 2.

101. See Fidler, *supra* note 9, at 53 (46% use grades; only 2% rely exclusively on grades).

system has come under harsh attack as inaccurate and imprecise, at best, and arbitrary, at worst.<sup>102</sup>

There is, however, a sense in which law school grades are both precise and accurate. They are precise inasmuch as particular students tend to "earn" consistent grades with a reasonably narrow range; they apparently measure something fairly well. That something is the student's capacity to psychoanalyze professors, to write quickly, and to analyze superficially various aspects of a complex legal problem; in measuring those skills law exams are remarkably accurate.<sup>103</sup>

Paradoxically, these attributes that the GPA measures with precision and accuracy have little to do with the effective research skills, incisive legal reasoning, persuasive advocacy, and originality that the ideal law review selection process is supposed to detect. Quite to the contrary, except for the student who has not cracked his textbook all semester, performance on a law exam does not call for original research. Moreover, certain attributes on which the law exam bases its selection are downright incompatible with good writing. Students need never write a decent English sentence on a law exam. Grammar counts for little in the face of severe time constraints.

The professor who admonishes students that good writing is half the battle on a law exam probably means that the answer should be organized and thorough, not that it should be well-written. Even superior organization and thoroughness in the answer's content do not necessarily translate into law review skill; the capacity to spot and discuss issues quickly and superficially is a far cry from the meticulousness and thoroughness that law review writing and editing demand.<sup>104</sup> The converse is also true: that a particular student cannot write an organized and thorough analysis in an hour says nothing of her ability to do so in a year. In short, the law school exam measures primarily cogency not of considered reason, but of conditioned reflex.

I would not go so far as to maintain, as some do, that success on law school exams is utterly unrelated to legal reasoning, originality, and even some elements of legal writing, but to assume even a strong correlation does not salvage the GPA-based selection process. To the extent that grades detect differences in levels of skill, "[t]he differences between stu-

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102. See *supra* note 25 and accompanying text.

103. Cf. Motley, *supra* note 24, at 736-43 (law exam measures "undesirable skills").

104. In fact, the meticulousness that the law review demands—bordering on anal retentiveness—is, for better or for worse, weeded out by law school exams. The student who dots every "i" and crosses every "t" is more likely to run out of time to spot the extra issue or make the extra "policy" argument that amounts to an "A" answer.

dents could be 'leveled' up at minimal cost."<sup>105</sup> If the law school "systematically accentuates differences in real capacities,"<sup>106</sup> the law review, assuming it is truly a worthwhile experience, further exaggerates them.

## B. The Writing Competition

Most law reviews select at least part of their membership on the basis of a writing competition.<sup>107</sup> In theory, such a competition assesses a student's research, analysis, and writing skills.<sup>108</sup> The writing competition, as typically administered and judged, however, has little to do with assessing any of those skills. It has much more to do with formalistic conformity.

### (1) *What Writing Competitions Do Not Measure Well*

Writing competitions cannot even pretend to measure research skills. The competition is invariably "canned" (i.e., preresearched) and the rules almost always prohibit reference to outside authority under penalty of disqualification.

The typical writing competition is also an inapt measure of analytical skills for at least two reasons. First, the contestant is generally subject to a strict code of "ethics" that prohibits discussion of the topic with others. This prohibition deprives the contestant of the academic's most valuable idea-testing tool—collegial collaboration. More importantly, the exemplar is short, typically seven to ten pages. A student is unable to engage in much analysis in that space, given the law review formalities that bind her.<sup>109</sup> Of a ten-page sample, the substance of seven or eight pages is likely to be identical from one sample to the next. That leaves two or three pages in which to dazzle the judges with brilliance or baffle them with bullshit.

Such short and formalistic exemplars, based on canned research and deprived of the benefit of collaborative idea-testing, could concededly measure *some* real differences in the authors' writing styles, originality, and analytical powers, but the judges are probably not measuring those qualities. Not that they do not purport to judge them—the litany of criteria assigned discrete point values generally includes those categories

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105. Kennedy, *Hierarchy*, *supra* note 1, at 31.

106. *Id.*

107. See Fidler, *supra* note 9, at 53.

108. But cf. Schlegel, *supra* note 10, at 19 n.2 (suggesting that random selection is better).

109. Cf. Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 282 (1962) [hereinafter Rodell, *Revisited*]. ("[T]he strait-jacket of law review style has killed what might have been a lively literature. It has maimed even those few pieces that actually have something to say.").

and others—but the judges are students, with only one more year of law school training than the competitors.<sup>110</sup> The primary difference between the judge and the contestant is that the former, after one year on law review, has learned to bluebook better and faster than the latter. The judges' inexperience with the medium undermines their ability to evaluate analysis, originality, and writing style. While I limit the following illustration to originality, similar observations might just as readily be made of analysis and writing style.

As judged in the writing competition, originality is likely to take on a stifflingly narrow meaning. So far as law students, and perhaps most professors, are aware, legal writing is governed by rigid rules, deviation from which is not original, but simply wrong. The students are likely to judge legal reasoning by the formalistic standards with which they have grown most comfortable: case-by-case analysis, nice distinctions, tenuous analogies, and blind adoption of the assumptions on which doctrine is based.

More often than not, the topic cries out for an abandonment of such doctrinal formalism. A smattering of one law school's most recent competition topics, for example, includes a right-to-die case involving removal from a severely demented patient of the nasogastric tube that nourished her;<sup>111</sup> an equal protection case in which an applicant was denied a firearm license because he had once committed himself to a mental hospital for a week;<sup>112</sup> and a prisoner's due process challenge to denial of work release, allegedly because of public opposition rather than statutory ineligibility.<sup>113</sup>

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110. See Kester, *supra* note 37, at 10 ("the process is left . . . in the hands of young people with little experience in evaluating legal skills, few standards by which to do so, natural naivete, and scant regard for the institutional future").

111. *In re Conroy*, 190 N.J. Super. 453, 464 A.2d 303 (App. Div. 1983), *rev'd*, 98 N.J. 321, 486 A.2d 1209 (1984).

112. *Galioto v. Department of Treasury*, 602 F. Supp. 682 (D.N.J. 1985), *vacated and remanded*, 106 S. Ct. 2683 (1986).

113. *Winsett v. McGuinness*, 617 F.2d 996 (3d Cir. 1980), *cert. denied*, 449 U.S. 1093 (1981). Other cases included: *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984) (first amendment claim against Library of Congress by employee who allegedly was denied promotion because of affiliation with socialist group); *Grace v. Burger*, 665 F.2d 1193 (D.C. Cir. 1981) (first amendment challenge against Supreme Court police who threatened protesters with arrest for distributing political materials and carrying sign with words of first amendment), *aff'd in part and vacated in part*, 461 U.S. 171 (1983); *Koski v. Samaha*, 648 F.2d 790 (1st Cir. 1981) (prosecutor allegedly threatened defendant with more severe sentence if she exercised right to appeal trial court's decision); *Virgin Islands v. Scotland*, 614 F.2d 360 (3d Cir. 1980) (suit by convict for specific performance on plea offer which he accepted before prosecutor imposed additional condition that he swear to truth of earlier statement implicating codefendant).

To take the first example, the truly original contestant might ignore the nice legal distinctions between heroic and nonheroic life sustenance or active and passive euthanasia, and instead construct a brilliant moral argument that it is always wrong to deprive a living human being of nourishment. She might in the third example ignore the statutory language and espouse an insightful political position that corrections boards should have the discretion to consider public opinion. Either entry might win the ten-point originality allocation, but will most assuredly lose more in the substance category. The contestant's version of originality would not conform to the rules, as the judge has been taught to understand them.

The student judges may not truly measure originality, even in the restrictive sense of the word, if they fail to account for two differences between the contestants and themselves. First, the judge, unlike the individual contestant, knows what other contestants have said. After reading twenty identical pieces, the judge cannot help but be attracted to the one that is dissimilar from the others. Dissimilarity, however, is too easily mistaken for originality. That nineteen hermetically sealed students all come up with the same idea does not negate the idea's originality; nor is there is much reason to suppose that the twentieth who comes up with a different idea is any more original. Second, the student judge starts out with a more expansive body of general legal knowledge than the contestant. An approach that the judge has encountered in class or the legal literature may nevertheless be original from the perspective of a contestant who is new to the entire field.

The knowledge disparity is particularly problematic when, as is usually the case, the editors choose a "leveling" topic, one chosen from the upper class curriculum on which no first-year class has focused. The theory is that no first-year section should have an unfair edge over others because its professor covered a relevant substantive issue in particular detail.<sup>114</sup> Whatever the merits or demerits of a leveling topic,<sup>115</sup> it certainly tends to widen the knowledge disparity between the contestant and the judge.

It is unfair to impute the two possible misapprehensions of "originality" entirely or exclusively to the judges' inexperience. An exper-

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114. The writing competition's format—typically a law review note or case comment—is chosen with the same leveling purpose in mind. Precisely because *no* student has ever written one, it is the preferred form.

115. Alternatives might include choosing a substantive area with which everyone is equally familiar; choosing an unfamiliar substantive area and *then* educating everyone to the same level of competence in that area; or allowing each student to select a topic.

perienced judge, having seen writing samples for several years, might well be even more struck than a novice by a dissimilar writing sample, and the knowledge disparity between a law professor and a first-year student will certainly be greater than that which divides a first- and second-year student. I strongly suspect, however, that an experienced judge—one, for example, who has taught first-year students and graded their law exams for several years—will be more attuned to the differences between themselves and the contestants and will be more likely to avoid the pitfalls that could lead to a false measure of originality.

## *(2) What Writing Competitions Measure*

I have enumerated many qualities that the writing competition, as administered and judged, does not measure well. Yet judges often agree that a particular entry is better than others, and several law reviews within the same school might invite the same contestant on the basis of the same or different entries. As was true of grades, it cannot be denied that the writing competition measures something accurately.

That something is formalistic conformity. The article must have the correct structure: facts first, then background, then discussion (which usually boils down to: “the case was right, but for the wrong reason” or “both positions are too extreme, and we ought to strike a balance”), and a short conclusion. It must evince just the right dosage of cititis and the standard footnote-to-text ratio. And heaven forbid the student should come up with a citation form that communicates a source better than does the bluebook’s prescription.

The slightest deviations from any of the specifications, despite the discrete point allocations to form and bluebooking, will lower the entry’s credibility in the judge’s eyes. The end result is a triumph of form over substance, rewarding the contestant more for staying inside the lines and painting by number than for brilliance, insight, and artistry.

That conclusion leads to two troubling implications. First, to the extent that the writing competition measures real differences in skill it is subject to the same criticism as the GPA-based selection: those skills are readily taught and the differences easily shorn up. Second, the writing competition, as administered and judged, is no more legitimate a criterion for law review selection than is the GPA.

## **C. The Publishable Note**

The submission of a publishable note, “publishing-on,” is a third method of member selection, and the one that most closely approximates the ideal. The long-term project can provide a basis on which to assess



research skills, analytical ability, style, and originality. Unlike the typical writing competition and the law exam, a publishable student note is exhaustively researched and meticulously documented, providing a reliable indication of the student's research skills.

The student's analytical abilities are also better measured by a long-term project than by a three-hour exam or a week-long writing competition. The long-term project is not subject to the writing competition's collaborative and length constraints. Contestants are free to discuss and test ideas with any colleague or professor. In fact, the submissions are often seminar papers that professors have already edited. To be sure, the contestant must still adhere closely to the law review formula, but because the contestant's submission can exceed ten pages, he can fit a good deal more substance into the note project than he could into the writing competition.

Finally, although the judges of the long-term works are still students, they are more likely to focus on the substance of an entry than are the students who judge writing competitions. The student judges still undoubtedly adhere to the narrow conception of originality, style, and analysis, but the impact of that narrowness is likely to be less exaggerated in this more realistic context.

To take originality as an example again, because the author chooses the topic, the judge's evaluation will not be skewed by what innumerable other contestants have said. Moreover, because the author of a student note researches the topic extensively, her knowledge of the topic is likely to be broader than the judge's knowledge. Accordingly, the contestant is more likely to devise an approach that is truly original in the relevant sense; and because the judge is less likely to have seen it before, he is less likely to conclude that a contestant's independently formulated approach is unoriginal.

Paradoxically, while almost every law review allows students to publish-on, it is the least utilized road toward law review membership. Less than one-eighth of all law reviews in a recent survey chose their membership exclusively by publishable note.<sup>116</sup> Although the reported data do not reveal what percentage of students publish-on when other means are available, my own unscientific sampling of law review manuals suggests that the proportion is negligible. Thus, the publish-on procedure does little to undermine the truth of the secret with which this section began: The credential of most law review members is false because

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116. Only 23% relied exclusively on an assessment of writing skills, and of them 23% selected membership exclusively on the submission of a publishable note. Fidler, *supra* note 9, at 53.

the process by which they are selected is false. Ironically, as a later discussion will demonstrate, publish-ons have to be largely excluded from law reviews that select members by other means because that acceptance of publish-ons threatens to divulge the first secret.<sup>117</sup>

#### IV. The Second Deep, Dark Secret: Law Review as an Illusory Experience

The discussion of the law review credential so far has assumed that a competition that does not accurately identify the best researchers, the sharpest intellects, the most persuasive advocates, or the most creative writers is ill-suited to the selection of law review members. There is, however, an ironic sense in which the falsity of the selection process does not matter. The job for which the competitors are vying depends little on such talents. Law review does not make you any smarter—the experience is illusory.<sup>118</sup> That is the second deep, dark secret.

The secret is well-guarded. Historically, a myth has emerged that law review experience is extraordinarily worthwhile. That myth has been so pervasive that the experience has often been offered as the law review's primary *raison d'être*,<sup>119</sup> prompting one author to propose that *The Law Review Should Become the Law School*.<sup>120</sup> As Dean Havighurst put it in 1956: "Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written."<sup>121</sup> Even the law review's critics have accepted the myth uncritically.<sup>122</sup>

The law review members have all heard the hype. But the vast majority know it to be exaggerated. Unlike the first secret, then, most members are fully aware of the second. If they are very perceptive, they

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117. See *infra* notes 159-65 and accompanying text (discussing how publish-ons threaten both secrets).

118. One commentator explains: "[L]aw review members in many cases experience two years of intellectual isolation, sharply decreased class attendance and much time spent engaging in two key law review activities—editing one another's papers and socializing." N.Y. Times, Mar. 22, 1981, at 18, col. 3 (letter to editor).

119. See Lee, *Administration of the Law Review*, 9 J. LEGAL EDUC. 223, 224 (1956) ("The first goal of any law review must be to teach."); Rotunda, *supra* note 38, at 4 (training alone justifies law review's existence); Warren, *supra* note 46, at 1 ("Most important, the review affords invaluable training to the students.").

120. Westwood, *The Law Review Should Become the Law School*, 31 VA. L. REV. 913 (1945).

121. Havighurst, *Law Reviews and Legal Education*, 51 NW. L. REV. 22, 24 (1956).

122. See, e.g., Cramton, *American Law Review*, *supra* note 8, at 5, 8-9 ("it remains unquestioned that law-review work is a valuable educational experience for most students who participate in it," but the concentration of members' efforts on selection of new members detracts from experience).

might infer it from the law review invitation letter. They will, in any event, be sure of it by the end of their first year on law review. Nevertheless, practically every member continues to do the required work and guard the secret, spurred perhaps by a desire to retain the credential and by a perception that they are qualified to do no more.

#### A. The Long-Awaited Letter: Invitation or Draft?

Law review membership begins with a letter of "invitation" that is vaguely reminiscent of the bid of the exclusive college fraternity.<sup>123</sup> While some invitations presume the student's acceptance,<sup>124</sup> most ask the initiate to RSVP.<sup>125</sup> It matters little, for, like its fraternity counterpart, the invitation is virtually never turned down.

The substance of the invitation is as telling as its form. Unsurprisingly, it incorporates suggestions of both experience and credential. First comes the credential. If ever the student doubted the legitimacy of the law review selection criteria, the letter makes it official. The edi-

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123. As was true of the law school bulletins, *see supra* note 82, I do not pretend to have scientifically surveyed all law reviews. I merely requested invitation letters and manuals from 30 law reviews of all levels of prestige. The themes that I extract here are almost uniform. Because the object here is merely to identify those general themes and not to embarrass any particular law review, the citations to internal law review documents and correspondence are coded. Redacted copies are on file at *The Hastings Law Journal*.

For an insightful discussion of the dynamic and motivation of the college fraternity, see *The Greek Rites of Exclusion*, Nation, July 4, 1987, at 10.

124. Letter from *Law Review A* Managing Editor to author (Feb. 28, 1986) ("The new members are posted upon completion of the grading; it is assumed that anyone enduring the pain of the [writing] competition will be willing to join."); Letter from *Law Review B* Editor-in-Chief to Invitees (Aug. 22, 1985) [hereinafter Invitation B] ("Feel free to stop by and introduce yourself at any time. We look forward to meeting and working with you."); Letter from *Law Review C* Editor-in-Chief to Invitees (undated) [hereinafter Invitation C] (concluding invitation with, "I will contact you early next month regarding an orientation meeting. Until then, you should consider a topic for your article."); Letter from *Law Review D* Editor-in-Chief to Invitees (Feb. 19, 1986) [hereinafter Invitation D] (concluding with, "Again, congratulations on your scholastic achievement and welcome to the *Law Review D*."); Letter from *Law Review E* Editor-in-Chief to Invitees (Mar. 4, 1986) [hereinafter Invitation E] (concluding invitation with, "We are proud to have you join our efforts.").

125. *See, e.g.*, Letter from *Law Journal F* Editor-in-Chief to Invitees (July 18, 1984) (requesting telephone acceptance within 12 days); Letter from *Law Review G* Editor-in-Chief to Invitees (July 10, 1985) [hereinafter Invitation G] (requesting acceptance by letter within nine days); Letter from *Law Review H* Editor-in-Chief to Invitees (Aug. 8, 1985) [hereinafter Invitation H] (requesting telephone acceptance within seven days).

The more exclusive specialized law reviews offer the same invitation. *See, e.g.*, Letter from *Law Review I* Editor in Chief to Invitees (July 29, 1984) (tax); Letter from *Law Review J* Editor-in-Chief to Invitees (July 15, 1984) (criminal law); Letter from *Law Review K* Editor-in-Chief to Invitees (July 23, 1984) (international business). In those cases, however, the invitation might not be quite as illusory because, unlike the "main" law review, they often have to compete with others in the same school.

tor-in-chief invariably opens and closes the letter by congratulating the initiate for "outstanding academic performance," a predictable and marginally reassuring vote of confidence from the most conspicuous symbol of law review credential.<sup>126</sup> Beyond the congratulatory salutation and closing, the credential theme is barely mentioned. It need not be; the first secret is so well-kept that no one questions the credential. Instead, the bulk of the invitation is devoted to a sales pitch that emphasizes the experience: members refine legal skills while furthering legal scholarship.<sup>127</sup>

Given the virtual inevitability of the member's acceptance, both the invitation format and the sales pitch are puzzling. Whether or not they are so planned, both serve useful functions. The invitation format reinforces the voluntary nature of the servitude to follow. No matter how powerful the external pressures that compel acceptance of the invitation, the member can believe that she was not drafted into the drudgery of law review; she volunteered.<sup>128</sup> As the work grows increasingly burdensome and mundane, the member can take consolation in the apparent freedom of the choice she made.

If its only purposes were to reiterate the credential and solicit the member to volunteer, one might almost expect the invitation to be short and sweet: "You may already be a winner. Claim your prize at any participating law review." But the invitation serves as more than a claim check for the prize. It is the first warning that the law review *experience* might not be what the student had anticipated. I would be willing to bet that half of the law review membership does not appreciate the nature of law review work, or that it entails *any* work, until they are selected. That is partially because of the emphasis on the credential for the entire preceding year. For some students, then, the invitation is the first suggestion that law review membership demands commitment and hard work ("40 hours per term on operations work, and perhaps 150 to 200 hours

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126. See, e.g., Invitation B, *supra* note 124 ("Congratulations and welcome to the ranks of Law Review!"); Invitation C, *supra* note 124 ("I am pleased to congratulate you on your exceptional academic achievement").

127. See Invitation D, *supra* note 124 (law review "will prove to be a valuable phase of your legal education. . . . [Y]ou will have the opportunity to expand and sharpen your skills."); Invitation G, *supra* note 125 ("opportunity to develop and refine your research and writing skills"; description of topics that "will be of special interest to the legal community"); Invitation B, *supra* note 124 ("excellent reputation as a scholarly publication"; "The discipline and training you will derive from membership on the Law Review is unparalleled."); Invitation E, *supra* note 124 ("excellent opportunity to develop analytical research and writing skills"; "the last or final word on the law is a privilege entrusted to the law review editors of our law schools").

128. Cf. Dalton, *Book Review*, 6 HARV. WOMEN'S L.J. 229, 238 (1983) (criticizing rhetoric of consent in liberal theory).

working on your piece"),<sup>129</sup> and that parts of the experience are not particularly rewarding ("not all *Review* work requires the mental acumen of a Supreme Court Justice").<sup>130</sup> Hence the sales pitch. It cushions the blow, reassuring the student that however tedious and irrelevant the next year's work on law review may seem, it will be good for him.

## B. Hell Year

Despite the myth and the invitation's assurances that law review is a valuable scholastic and creative experience, with the first law review assignment, the member begins to harbor doubts: Was the sales pitch a sham? Was the selection process no more than a contest to determine who will get to clean the law review's floors? If the invitation is like a fraternity bid, law review work, for most, is akin to "hell week," the week-long period of torture and humiliation that pledges must endure to prove their worthiness to keep the fraternity's deep, dark secrets. There are only two differences. First, the law review member's hell lasts a full year. Second, hell week, appropriately or not, is merely the rite of passage to the fraternity's putative benefits; once the initiate enters, hell week ends. In contrast, law reviews attempt, somewhat successfully, to convince their initiates that the benefit they offer *is* their hell year.

By the end of the first year on law review, the member should have learned the law review's second deep, dark secret. This section examines the experience and offers speculations as to why, in the face of hell year, the member never divulges the second secret.

### (1) "Thank you, Sir. May I have another?": Law Review as an Experience

The most notorious symbol of hell week is the fraternity pledge paddle; each initiate painstakingly carves one and engraves on it the mystical fraternity letters. On the eve of initiation, the initiate bends over to be paddled with the product of his own labor, the symbol of fraternal unity. With each resounding smack, the initiate must repeat the words, "Thank you, Sir. May I have another?"

The law review's paddle, engraved with the words, "A Uniform System of Citation," is the bluebook. The law review initiate is smacked with assignment after tedious assignment. The submission of (and to)

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129. Invitation *H*, *supra* note 125 ("Please consider whether you can realistically make a major commitment to the *Review*."); see Letter from *Law Review L* Editor-in-Chief to Invitees (undated) ("two credits in exchange for your work on the *Review*"); Invitation *G*, *supra* note 125 ("Although the work can be demanding at times, we believe your experience on the *Law Review* will be both worthwhile and rewarding.").

130. Invitation *H*, *supra* note 125.

each assignment is an implicit request for the next. Members are rarely expected to apply a whit of the superior intellect and creativity that membership ostensibly recognizes. Instead, law review work consists primarily of "production work" and an often bogus writing program.<sup>131</sup>

Little need be said about production work. A typical explanation of bluebooking is as follows:

Bluebookers are required to read all the cases, law reviews, treatises, statutes, and other materials cited to make sure they support the author's thesis and argument, and check every footnote to make sure that they conform to the stylistic rules laid down in the [law review's] Editors Guide and the Bluebook.<sup>132</sup>

The task emphasizes form over substance.<sup>133</sup> While there may be some practical value in learning to bluebook, it is not so great as to justify a year of practice. Typing the articles, on the other hand, is entirely devoid of academic value, as are office hours, proofreading, and envelope stuffing. I do not presume to judge the worthiness of these occupations; they might well be nobler and more productive than the publication of legal drivel. The point is simply that most law review work has little to do with the experience that the law review promises—to make better lawyers or legal scholars.

The writing program is seemingly better suited to the task. Billed as "the most significant responsibility of staff membership," the writing program "is important to the [law review] because as an institution its members are expected to possess high-quality writing and research skills and as a publication its reputation depends largely on the quality and quantity of its student writing."<sup>134</sup> As described, the staff member is under intense editorial supervision. The board sets strict timetables for topic selection, research, outlining, first draft, and so on.<sup>135</sup> All the while, the editor sharpens the member's analysis and refines her writing. The inevitable end product, it would seem, is a publishable note.

That description borders on fantasy. In the first place, one can

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131. See Fidler, *supra* note 9, at 55-57 (surveying law review staff responsibilities).

132. LAW JOURNAL F, STAFF MANUAL AND CONSTITUTION 14 (1984) [hereinafter F MANUAL].

133. See *infra* note 193 (quoting Judge Posner's description of bluebook as triumph of form over substance).

134. MANUAL F, *supra* note 133, at 11; see also LAW REVIEW A, MEMBERS' MANUAL 14 (1985-86) ("The reputation of the Review depends to a great extent on the quality of its student writing."); LAW REVIEW G, LAW REVIEW HANDBOOK 1.10 (1985) (one paragraph introducing writing program includes: "opportunity for the author to develop writing and research skills"; "service to the legal community"; "process is designed to insure that student works meet these criteria and will reflect favorably on the reputation of" law review).

135. See, e.g., LAW REVIEW L, OPERATIONS MANUAL 19-23 (1984) [hereinafter MANUAL L] (extensive month-by-month timetable for writing of note).

hardly expect law review editors to impart to members much in the way of writing skill if the law school never teaches the editors to write well.<sup>136</sup> That there is not much skillful writing going on in the law review office is hardly a revelation. The late Fred Rodell said *Goodbye to Law Reviews* in 1936 and again in 1962.<sup>137</sup> Three sentences sum up his conclusion: "There are two things wrong with almost all legal writing. One is style. The other is content."<sup>138</sup> Others have repeated those sentiments with increasing frequency.<sup>139</sup> It suffices to say that the writing that law review members are trained to produce is, for the most part, uninspired, insignificant, and stilted.

It is perhaps unfair to condemn the law review for teaching what has come to be law review writing. It is, after all, the language of legal scholars. A more serious criticism is that, as administered, the law review writing program does not teach even that. More often than not, the members know they can get by with the barest minimum. Timetables are flexible. The editors, however well-intentioned, have little leverage with which to force members to write. There is always the threat that "[a]ny staff member who fails to fulfill the [writing] requirements . . . shall automatically be referred to disciplinary proceedings."<sup>140</sup> Yet, only those who fail to do production work are ordinarily punished. Rarely is a member ousted or otherwise punished for turning in a low quality product, or no product at all, to satisfy the writing requirement. It is no wonder that the vast majority of law review members' notes are never published,<sup>141</sup> and that the law review needs to turn to the nonmember author for material.

Even when the member writes, the project's connection to the law review is often tenuous. Either work submitted for a required writing course satisfies the law review's writing program, or law review work satisfies the school's writing requirement.<sup>142</sup> In the former case, a student

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136. See Kissam, *Thinking (By Writing) About Legal Writing*, 40 VAND. L. REV. 135, 141-51 (1987) (law school fails to teach "critical" dimension, or the process, of writing).

137. Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936); Rodell, *Revisited*, *supra* note 109.

138. Rodell, *Revisited*, *supra* note 109, at 279.

139. See, e.g., Boyle, *supra* note 6, at 18; Cramton, *American Law Review*, *supra* note 8, at 7-10; Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317, 321-24 (1985).

140. MANUAL F, *supra* note 132, app. B, at 9.

141. Over half of the law reviews in Fidler's survey were able to publish less than one out of three notes submitted by their own members, and a full 82% published less than half. Fidler, *supra* note 9, at 56. Despite the increase in the size of law review staffs, their generation of student work has declined over the years. Roger Cramton reports that three prestigious law reviews in the period 1980-1983 published 0.4 notes per second-year member, compared to 1.9 in 1955-1958. Cramton, *American Law Review*, *supra* note 8, at 6 n.24.

142. 75% of law schools surveyed awarded academic credit for membership, and law re-

might submit a seminar paper, which is also required of the rest of the student body, in full satisfaction of her law review writing requirement. Moreover, strict honor codes often prohibit submission of such a paper to a law review editor until after grading by the professor. In the latter case, the law review member is simply doing what everyone else in the school is doing, only he calls it a law review submission and everyone else calls it a seminar paper. In either case, law review members get no more writing experience by virtue of their membership than do their nonmember counterparts.

Despite the failure of the law review program to fulfill its promise as a unique scholastic experience, some members truly believe it to be worthwhile. Perhaps their perception is clouded by the law review credential. If enough people—employers included—maintain that law review is a valuable experience, it becomes difficult to deny.<sup>143</sup> It may also be that some members recognize law review work as the mindless tedium that it is, but are nevertheless taken with its importance. The law review itself cultivates both myths. As to the importance of their role, the member is told that each task will bear on the reputation of the law review, the law school, the editorial board, and the member herself.<sup>144</sup> She is an integral part of a well-oiled machine.<sup>145</sup> As to the value of the experience, the law review explains that the job is for the member's own good. The intricate process

provide[s] you with an opportunity to improve your ability to analyze legal issues, to do legal research, and to write clearly and precisely. In

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view membership suffices in the overwhelming majority of schools that have a writing requirement. See Fidler, *supra* note 9, at 62.

143. Even prominent scholars assume that law firm wooing of law review members is an indication of the quality of the law review experience. One commentator, for example, repeated the equation twice in one breath: "[T]he [law review] training has been remarkably successful. Law firms woo those with law review experience. Even in the era where law review selection is often not only the product of class rank, law firms still lavish special attention on those with law review experience." Rotunda, *supra* note 38, at 5.

144. See, e.g., MANUAL L, *supra* note 135, at 29:

To earn this reputation [as a high quality legal periodical] and keep it, what we publish must be not only current and insightful, it must also be well written and accurate. Later researchers . . . must be confident that the source will say what the Review says it does. . . .

A citation not in Bluebook form may seem a trivial error but . . . [i]f the Review doesn't perform such a simple task, a reader may properly wonder how many other, more major errors we ignore.

See also MANUAL F, *supra* note 132, at 16 ("precise bluebooking, although admittedly tedious, is a mark of professionalism").

145. MANUAL F, *supra* note 132, at 5 ("Each step in the process for each article is crucial to getting the issue out on time—a delay by one bluebooker can hold up an entire issue even though dozens of other Editors and Staff members met all their deadlines.").



these areas, the [law review] provides an educational experience superior to virtually any other available at [the law school]. We hope that you will not only learn from it but enjoy it as well.<sup>146</sup>

For whatever reason, the members almost invariably answer, "Thank you, Sir. May I have another?"

(2) *Keeping the Pledge: Why the Member Remains and Maintains Silence*

While I have acknowledged that some law review members may actually believe the experience is benefitting them, most probably do not. One must wonder why students who thought they were to be rewarded for superior talent are willing to endure such torture, and endure it without divulging the law review's secrets. Just as in the first year of law school, the members repeatedly ask, "*Why am I taking this shit from them?*"<sup>147</sup> Two explanations suggest themselves, each mirroring the most fundamental criticisms of the law school generally. First, the value of the law review *credential* becomes more concrete. Second, for a full year, the law review novice learns that he is *incompetent* to do any more than the work he is assigned.

a. *Credential Solidification*

Over the summer vacation between the first and second years of law school, the law review, once a milestone towards which to strive, becomes a yardstick against which to measure success. It superimposes over the student body a rigid hierarchy. Some make it, most do not. Even among the law reviews, there is a hierarchy. As section V will discuss in greater detail, since members on each of the law reviews perform essentially the same tasks, the differences in prestige are attributable entirely to the credential that each signifies. After a year's worth of legitimation, the student body internalizes that hierarchy, its falsity notwithstanding. Just like the grades on which membership is often based, members and nonmembers alike perceive their place in the law review hierarchy as "something that is just 'there' inside them."<sup>148</sup>

There is more, however, to the power of the law review credential than mere internalization of an abstract ranking. The hierarchy is reinforced by the same concrete rewards that seemed to legitimate the credential during the first year.<sup>149</sup> On entering the school, members stop

146. *Id.* at 2.

147. Kennedy, *Polemic*, *supra* note 15, at 76 (emphasis in original); see *supra* note 17.

148. Kennedy, *Hierarchy*, *supra* note 1, at 51; see *supra* notes 26-27 and accompanying text (discussing internalization of grades).

149. See *supra* text following note 99 (describing concrete rewards that legitimate law review credential).

into their offices, hang up their coats and leave their books, while the rest of the students must be content to cram theirs into undersized lockers. The members emerge from their offices with mugs of free coffee while the rest of the school must be content to stand in cafeteria lines filling styrofoam cups and paying the price. At night, when the rest of the students are herded out the library door, members can stay, asserting their dubious after-hours privileges.<sup>150</sup>

Members are also the victors in the competition for their professors' time and the administration's attention. Whether it is because the law review member has enhanced credibility, or because the faculty and administration have vested interests in the perceived quality of their school's law review, the disparity in attention afforded the law school's "intellectual elite" and the rest of the student body is glaring.

Finally, there are the ego boosters, the accoutrements of membership that serve no purpose other than to appeal to the member's craving for self-importance. Consider for example the masthead, publicizing every member by name and rank. This gives the member much-needed recognition in an otherwise anonymous law school setting, but is otherwise practically nonfunctional.

The perks and status alone make it difficult to denounce law review work. The law review member would have trouble justifying her claim to them after admitting that *anyone* could do the work; conversely, to denounce the work is to renounce one's claim to the perks.

Denunciation becomes all the more unlikely once interview season raises the stakes.<sup>151</sup> Students' careers turn on the fortuity of law review membership. It is perhaps neither a necessary nor a sufficient condition to the choice positions among clerkships, law firms, public-interest groups, or government jobs, but it certainly opens doors, and it rarely hurts. All employers, or at least all those who interview on campus, assume the law review to be valuable. Some will not even consider students without the law review credential, purporting to value the experience it engenders.<sup>152</sup> Moreover, the value of the credential is tied to the law

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150. See, e.g., MANUAL F, *supra* note 132, at 21-23 (listing as perks: after hours library access; photocopying facilities; access to MCI long distance telephone service; message service; bulletin board advertising space; coat hooks; and cabinet space for books).

151. See Rodell, *Revisited*, *supra* note 109, at 285:

The students who write for law reviews are egged on by the comforting thought that they will be pretty sure to get jobs when they graduate in return for the slavery, and the super-students who do the editorial or dirty work are egged on even harder by the knowledge that they will get even bigger jobs.

152. See N.Y. Times, Mar. 22, 1981, at A18, col. 3 ("Law firms and corporate law departments in every major city screen job applicants on the basis of first-year law school grades and

review's status within the inter-law review hierarchy.

Whatever the reason, law review members get the earliest and the most prestigious offers. To denounce the law review at this point implicates not just perks but the member's future. Renunciation of the credential, however illegitimate it may be, narrows career options. The member does the work, because he wants to keep the short-term credential, which can translate into a long-term, if equally false, credential.

If long-term status were the sole motive force preventing members from denouncing the law review and divulging its secrets, one might expect many more members to abandon the law review after the first interview season. That so few do is attributable, at least in part, to the fact that they have not yet depleted the law review's credential value. Members, especially those whose grades are lower or who may not return to their summer firm, might still be concerned about the law review credential for permanent employment. Others may begin to think about the judicial clerkship process, which begins soon after the law firm interview season ends. Prestigious judges tend to require law review experience.

If the explanation posited so far is true, one might expect a mass exodus from law review by its third-year members who presumably no longer need the credential. In fact, however, the rate of attrition among third year law review members is also low. There are two related explanations for this. First, by the third year there is no reason to reject the credential and divulge the second secret; the paddling has stopped, perhaps because the paddlers know they *must* stop. After all, third years are utterly unwilling to do any more than a modicum of work to retain their credential. Second, once the paddling has stopped, it is in every member's best interest to keep the secret. Having paid the price for the credential, it would be self-destructive to devalue it.

#### b. Perceived Incompetence

A second possible explanation for the member's willingness to submit to the law review torture is best introduced with an anecdote. A particularly feisty staff member felt understandably oppressed by the size of the "production packet" that he was typing. Between hunts and pecks on the keyboard, he threw up his hands in frustration and declared, "They could have gotten a monkey to do this." Just then, the edi-

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membership in law reviews avoiding year after year the burden of attempting to evaluate potential employees on the basis of overall experience and ability."); *see also infra* notes 194-98 and accompanying text (discussing anomaly that law firms with greatest number of law review alumni most value the credential).

tor-in-chief, still a guru to the fledgling member, walked by and retorted, "We did."

While the law review credential is being reinforced, the member also receives a somewhat conflicting message. Like the fraternity pledge, he is no more than a peon, and just as the first-year law student has been conditioned to internalize professorial abuse, the fledgling law review member's response is to accept that position: "I *deserve* to take this shit. I am wrong and stupid."<sup>153</sup>

The law review's intricate institutional practices, often precisely defined in the staff manual, reinforce the feeling of near worthlessness. The staff is expected to carry out specific duties under threat of harsh penalties. Several sanctions are threatened including a warning, more work, adverse formal evaluations, cleaning out the refrigerator, and expulsion.

If and when the member realizes that the assigned tasks are not nearly as rewarding as the invitation had promised, the higher-ups explain that she is just not ready for the rest. Underlying the myth of self-importance, then, is a deeper and, as time goes on, much more pronounced theme of incompetence. The second-year law student can be trusted with only the most mundane of tasks, and even that work seems to devolve into an exercise in institutionalized browbeating. Staff members sit for hours with their respective editors and review each change, word by word, comma by comma. In some law reviews the preparation for that sitting entails photocopying every source that is checked. The member bears the burden of proving that the author cited the wrong page or left out a comma in quoting an authority. Sometimes, despite these safeguards, the member has missed a space or a comma that the editor's keen eye catches. He is duly chastised, and the incident is duly memorialized in the member's "permanent file."

The member's response is a mixture of resentment and internalization. As time goes on, the members feel themselves incompetent to do anything but technical cite checking. The substantive corrections that they do make, are often so tentative that it is not clear how important the staffer believes a given change to be. The member becomes alienated from her work product so that both the quality of her work product and her sense of identification with it decline.

This same theme of incompetence is reflected more subtly in the writing program. The dearth of originality in student notes should not be surprising. The student is permitted to say practically nothing that

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153. Kennedy, *Polemic*, *supra* note 15, at 26; *see supra* text accompanying note 17 (discussing similar reaction to professorial subjugation).

has not been said before. He must prove that it was not his idea by dropping a footnote citing the source that already said it.<sup>154</sup> When the student does say something new, it is never in an article. It is belittled under the heading "note" or "comment," as if it had been scribbled on a grocery list and tacked to the refrigerator. Further, the student—the nobody that she is—is reminded of the triviality of her own existence by having her name appended, if at all, at the end of the note and her work attributed to the board.<sup>155</sup>

### (3) *Credential vs. Incompetence*

There is admittedly something odd about the foregoing discussion of the motives for both remaining on law review and keeping its secrets. The two proposed hypotheses seem to be in tension. The first hypothesis, credential solidification, holds that the member will endure hell year to preserve his status in the hierarchy and reap the benefits of the credential; the second, perceived incompetence, holds that the member will endure the tedium because he is convinced that he is unqualified for anything else. The first depends on the member's thirst for self-aggrandizement, and the second on his susceptibility to deprecation. The first, if internalized, conduces a feeling of self-importance, and the second, self-doubt.

The hypotheses are not entirely contradictory. The same person could at the same time be driven by a credential yet doubt his capabilities. Indeed, as insecurity mounts, the yearning for some outward symbol of achievement is likely to grow stronger. Conversely, the more a member internalizes the credential and the more he considers the law

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154. In one particularly humorous illustration of the cititis syndrome, a bluebooker came across the following tongue-in-cheek prediction about the impact of today's pollution on future generations:

If Earth were to become one big warehouse for interplanetary use, humans would care little whether the air is breathable or the water free of radioactive wastes.

If the Earth becomes a suitable place to store the galaxy's frozen foods, future generations might hail our foresight in inducing the greenhouse effect.

Rosenkranz, *A Ghost of Christmas Yet to Come: Standing to Sue for Future Generations*, 1 J.L. & TECH. 71, 92 (1986) (footnote omitted). The bluebooker's sole comment was, "Cite?" See also Boyle, *supra* note 6, at 18 (recounting story about facetious assertion that "male voice rationality is characterised by an obsessive need for 'authority'").

155. Rodell offered a more charitable explanation: "[T]op dogs among the law review authors . . . are forced to confess authorship in public, whereas the small fry are spared the embarrassment of signing their names." Rodell, *Revisited*, *supra* note 109, at 284. Whatever the explanation, the law review editorial board takes credit for the opinions expressed in its student notes. The implication is that the individual student is incapable of formulating and expressing his own ideas. Further, if a student note is truly the voice of the editorial board, then the student has diminished leeway to express novel or unpopular ideas.

review socially valuable, the more frustrated he is likely to become by the message of incompetence. Whichever of the two motive forces is stronger, the results will be the same: adherence to the credential and resentment of hell year.

## V. Hierarchy and Self-Doubt

The previous section's discussion of perceived incompetence is not the first place in this critique that the notion of self-doubt has arisen. It arose first in the defense of the law review, where I speculated that law review could overcome self-doubts caused by professorial oppression and the dearth of feedback.<sup>156</sup> So far, however, every subsequent mention of self-doubt has contradicted that speculation. This section, which explores the self-doubt that arises out of various hierarchies in the law review setting, adheres to that pattern. I consider first the hierarchy of members in law reviews that have several methods of selecting members. Next, I consider in turn two inter-law review hierarchies, the hierarchies of (1) law reviews within the school<sup>157</sup> and (2) law reviews from one school to the next.<sup>158</sup>

### A. The Intra-Law Review Hierarchy

If the discussion of the first deep, dark secret (the falsity of the credential) does not convince the reader that the two most prevalent law review selection methods are false, it at least suggests that certain processes measure writing skills better than others.<sup>159</sup> Among the three criteria discussed, the publishable note is the best in that regard, then the writing competition, and then the law exam. So well-guarded is the first secret, however, that members of law reviews that administer more than one selection process assign them the reverse ranking. A hierarchy of members emerges that reflects that perceived ranking.

The hierarchy is not formal; all members, regardless of the manner in which they are selected, list the same credential on their resumes. In fact, few members will acknowledge the stratification explicitly, and those who do are reproached with self-righteous indignation.<sup>160</sup> The typ-

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156. See *supra* text accompanying notes 17-27 (discussing sources of self-doubt in law school).

157. See *supra* text preceding note 148 (noting intra-school hierarchy of law reviews).

158. I am indebted to Michael Small for many of the ideas developed on the inter-law review hierarchies.

159. See *supra* text accompanying notes 101-03, 107-08.

160. A recent incident at one law review illustrates this point. A candidate for Editor-in-Chief in an apparent slip made a public statement to the effect that "we are all very bright, except maybe for the handful of people who wrote on." What was most intriguing was

ical characterization and administration of the various competitions, however, strongly suggest an implicit stratification.

The first glimmer of such an intra-law review stratification comes, once more, from the law school bulletin. Practically every bulletin that describes a system of both grade-ons and write-ons (or publish-ons) explains that students are invited to join the law review *either* on the basis of "academic success" *or* on the basis of a writing competition. The implication is that GPA is the sole measure of academic success. It is not at all clear what the writing competition is thought to measure.

One might easily dismiss that hint as a tenuous inference from loose language. Concededly, such skepticism would be appropriate, were it not for the frequency with which law reviews themselves reinforce the hint. The invitations to law review often similarly equate grades with academic success and the writing competition with some sort of aberrational talent that grades might occasionally miss.<sup>161</sup> The hint also frequently pervades discussions of law review selection. One internal law review memorandum, for example, observes "that many students who for various reasons (health, pressure, psyche) do not excel in examinations are *nonetheless* capable of making a significant contribution to the [law review]."<sup>162</sup> Again, the implicit assumption is that those who excel on exams are necessarily valuable contributors; those who do not, but can contribute anyway, are aberrational.

The administration of the various competitions also suggests the substatus of write-ons and publish-ons. Many principal law reviews that hold writing competitions identify the grade-ons first. Only then do the write-ons enter the picture.<sup>163</sup> Publish-ons do not show up until well into the second year. The non-GPA selection processes appear to be afterthoughts.

The students who publish-on are the most disdained of all. Referred to in many law schools as a "non-*Journal*" or "non-*Review*" author, the competitor who takes this route to law review is, by definition, an out-

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not the slip itself—anyone could have done that— but the reactions of the grade-ons. The school was buzzing the next day with reports of the terrible slip. Everyone seemed mortified. The crime, it would seem, was not in *believing* that grade-ons were smarter than write-ons, but having violated the cardinal rule never to shatter the outward appearance of harmony and equality.

161. See *infra* note 126 (quoting law review invitation letters).

162. Memorandum from Joint Comm. on Affirmative Action to Executive Board 3 (undated) (emphasis added) (law school affiliation withheld).

163. Georgetown is a typical example. While all writing competitions are evaluated before grades are finalized, the student who qualifies on the basis of both grades and writing is told *only* that she graded on.

sider. That outsider status is not merely nominal; the nonmember author is treated as an outsider. In the first place, the author's piece is typically subjected to a standard so stringent that the percentage of nonmember pieces that are accepted is negligible.<sup>164</sup> This is particularly anomalous in those law reviews that will not even consider a nonmember's note unless a professor certifies it as publishable; such submissions tend to be the best seminar papers that the professor has received from a class that has studied and discussed the subject matter.

Furthermore, the nonmember's submission commands less editorial attention than does a member's. Those that are rejected are rejected outright, without the benefit of the extensive editorial comments to which the member is entitled. Thus, outsider participation is discouraged from the outset. The combination of acrimony and stringency discourages nonmembers' submission of notes and reduces the chances that those that are submitted will be published.

It is easier to detect clues of an intra-law review hierarchy than to explain them. I venture one, perhaps overly cynical, explanation for the disdain with which nonmember authors are treated.<sup>165</sup> The essence of the explanation is this: The invitation of nonmembers to law review is essential to the law review's survival in its present form because of the dearth of publishable notes by members, but the nonmembers are resented because their inclusion threatens to expose both of the law review's secrets.

The subversion of the credential (the first secret) is the clearer threat. The acceptance of a nonmember's note suggests that the normal routes of selection, and therefore the awarding of the credential, are both overinclusive and underinclusive. If the law review's members do not produce enough publishable student pieces, then many or most students selected for membership are not after all particularly valuable contributors to the law review. Furthermore, that there are nonmembers who can write publishable pieces means that the selection process does not identify every potentially valuable law review contributor.

The law review's reputation as a worthwhile experience (the second secret) is also subtly subverted by the nonmember author's admission. The nonmember's bypassing of a year of law review work could easily foment resentment among members. They, unlike the nonmember authors, had to pay for their credential with hard labor. Moreover, the nonmember's success tends to confirm any doubts a member might enter-

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164. See *supra* note 116 and accompanying text.

165. A similar argument might also be made of the disdainful treatment of the write-ons.



tain as to the value of the experience. After all, the nonmember author who has never participated in the endless chores of bluebooking and typing is more successful than most law review members in writing a piece of publishable quality.

Whatever the source of the credential stratification, it prevents the law review from fulfilling its potential as a dealienating force. First, the implicit hierarchy fosters competition and resentment, not comradery. To the extent that some law review members fancy themselves superior, and others feel themselves unjustifiedly scorned, the law review enhances alienation. When one group feels compelled to disparage others, and the others feel compelled to justify their existence, the law review comradery will be no healthier than that which characterizes inter-student relations in the law school generally.

Second, if my speculations on the intra-law review hierarchy are correct, then insecurity will grip everyone. The ritual of disparagement and self-justification will undermine the confidence of those who are not at the top of the supposed hierarchy. They could begin to doubt the legitimacy of their credential, and the worthiness of their membership, despite the first year's legitimating effects. Moreover, even those at the top of the *perceived* hierarchy are likely to doubt their own credential if, as I have suggested, the administering of other selection processes belies the legitimacy of their membership.

## B. The Inter-Law Review Hierarchies

Some law reviews choose their members on the basis of a single selection criterion. Since, in those situations, no intra-law review stratification is possible among members in the same class, the students might not engage in the ritual of self-justification and mutual disdain that prevails at stratified law reviews. There are, however, inter-law review hierarchies that are even more confidence-shaking. First, there is the hierarchy of law reviews within schools. Then, there is the inter-school hierarchy of law reviews.

### (1) *Credential Differential: The Intra-School Hierarchy*

Most major law schools feature several law reviews.<sup>166</sup> Generally one is referred to colloquially as the "main journal" or "primary review" while the others are deemed "lower" or "secondary" reviews. (For con-

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166. A recent survey found that 14 out of 20 of the most prestigious law schools have three or more publications; Harvard had the most, with seven, followed by Columbia, with six. Zenoff, *supra* note 8, at 22 n.5. The survey is slightly outdated; at last count, Georgetown had eight.

venience, I will adopt that terminology, but not the value judgment it implies.) The lower review members are unquestionably subject to the same perceptions or delusions of self-importance as are their counterparts on the main review. There is as much reason for them to believe that they are contributing to legal scholarship, and that they were properly selected to do so. The lower review members are also plagued by the same self-doubts about the illegitimacy of their credential and the value of their contribution as are their main review counterparts. If they internalize their lower position in the intra-school hierarchy, however, they have an additional source of self-doubt.

As a preliminary matter, we can expect lower review members to internalize their position in the hierarchy no less than main review members and students who made no law review. Particularly revealing in that regard are the myriad of rationalizations by which some lower-review members explain their plight. They range from a faulty watch to the death of a pet.<sup>167</sup> "I just missed grading on to the main review by 0.1 percentage point," could be the law school fight song. It is as if that fraction of a percentage point would magically make the speaker a legal scholar or a better person. At the same time, the whining is somewhat self-promoting: implicit is a statement that the speaker is just as good as the ones who made the grade-point cutoff; his failure was a fluke. In any event, far from questioning the hierarchy, he legitimates it by assuming that an explanation is warranted in the first place. Almost invariably, the student doubts herself before doubting the system.

Even the rare lower review member who sees the selection process for what it is, might nevertheless internalize the ranking, for as the credential of law review grows increasingly concrete so too does the credential differential between law reviews. The administration reinforces the differential. The resources and perks of lower reviews tend to be more limited and their space more cramped.<sup>168</sup> The budgetary disparity between main and lower reviews can be perceived as nothing but an administrative judgment of the relative value of each.

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167. My colleague, Michael Small, tells the story of a student who complained at least once a week for a year about how he had misread his watch during the Civil Procedure examination. To this day, the poor soul recounts the tale of woe. But for the lapse, he would have been able to finish the question on *International Shoe* and made the main review, or so the story goes.

168. Those law reviews that have large budgets derive their income from benefactors outside the school, but because those outside sources are usually private interests with their own agendas, they often interfere more with the law reviews' editorial freedom, implicating self-doubt in other ways. Cf. *infra* text following note 169 (discussing lower review member's perception of forced specialization).

Those material differences might be innocuous if the relationship of the lower reviews to the faculty and administration were not so distant. Because the main review bears more directly on the law school's prestige, professors and deans tend to be more concerned with its success. In contrast, there comes a point at which the administration seems to perceive the lower reviews as distinct liabilities in the prestige calculus. Perhaps for fear that proliferation of law reviews will somehow devalue the currency, the administration seems reluctant to authorize the creation of additional lower reviews.<sup>169</sup>

When the administration does certify a secondary law review, it invariably must be specialized in subject matter. Some specialization undoubtedly makes sense. Whereas there is insufficient demand for more than one book of general jurisdiction, there is almost always an audience for the specialized reviews. Yet, that does not explain why the main law review is invariably the one of general jurisdiction. The only explanation that comes to mind is an unwritten precept that lower reviews should never compete directly with, and should always be distinguishable from, the main reviews. Faded distinctions would prevent employers from easily discerning the hierarchical lines.

Although a general scope is inherently no better than a specialized scope, forced specialization among lower reviews is particularly likely to reinforce self-doubts. First, forced specialization might be perceived by the lower review member as a reminder of her own incompetence, implying a distrust of her ability to handle anything beyond the narrow confines of a specialty. Second, if the law review specializes in an area in which the member has no interest, expertise, or future, her participation is likely to be less than wholehearted, her identification with the product more remote, and her resentment deeper.

Finally, the legal community outside the law school reinforces the credential differential. To be sure, the lower review members can line up the same prestigious jobs and reap the same benefits as their counterparts on the main review, but their chances of doing so are slimmer. When potential employers perceive the credential difference as real and act accordingly, the lower review member is likely to accept it too, despite any initial doubts about the selection process.

Despite the clear credential differential, membership on the lower reviews demands the same mundane tasks that main review members

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169. See *Georgetown's Publishing Dilemma: Which Journals Should It Endorse?*, Nat'l L.J., May 12, 1986, at 4, col 2 (discussing, without capturing the venomous controversy surrounding, Georgetown administration's decision as to which of three fledgling law reviews to certify).

endure. If the experience offered by the main review is empty, then the lower review member's experience is no less so. At that level, the credential may not be worth the tedium. On the other hand, especially when membership is based on grades, the credential may be more important to the lower review member than to the main review member whose transcript identifies him as a top student.

(2) *Self-Doubt Among the Big Peckers: The Inter-School Hierarchy*

Perhaps unbeknownst to the members of the lower reviews, they are not alone in insecurity. While the main review members are at the pinnacle of their school hierarchies, their status in a national pecking order of reviews—a ranking that Duncan Kennedy has aptly described as “bullshit”<sup>170</sup>—deflates even their egos.

Every law review longs to be *Harvard Law Review*, the biggest pecker of them all. It seems like a class act. It publishes eight issues a year, and the editors magically manage to meet their cover dates every time. What no one seems to realize is that *Harvard Law Review* members are not necessarily more competent than their counterparts elsewhere. There is no magic to publishing on time when the law review has resources that others lack. With the full-time support staff that *Harvard* has, anyone could speed production. Inevitably, however, the less well endowed law reviews ignore *Harvard's* budgetary advantage and impute its success to the superiority of its members.

In all fairness, it is not just the operational supremacy of prestigious law reviews that make others insecure; it is their prestige. Practitioners and judges, especially on the federal bench, continue to cite disproportionately the most prestigious law reviews.<sup>171</sup> The most sought-after scholars will decline the less prestigious law review's invitations to publish in favor of the more prestigious.

These two sources of self-doubt are mutually reinforcing. At least when it comes to lead articles, the disproportionate citation is a function of the relative notoriety, and therefore credibility, of the authors that publish in the top law reviews. Because the most prominent scholars are most likely to publish in *Harvard*, it is at least conceivable that *Harvard's* lead articles actually are superior, at least under the standards by which legal scholars measure quality.

It is much harder to believe that the disproportionate citations to *Harvard* notes, written by second- or third-year students, evince their

170. Kennedy, *Liberal Values*, *supra* note 52, at 605.

171. See *Reviewing Reviews*, *STUDENT LAW.*, Mar., 1986, at 5, col. 1 (reporting survey of citation to law reviews).

uniform superiority over, for example, *Vanderbilt's* notes. When courts subscribe to a slew of reviews, it is anomalous that judges and their clerks still turn to the "heavyweight" journals for student notes. Yet the credence that both bar and bench give to the most prestigious law reviews cannot help but foster feelings of inadequacy among the less prestigious elements of the pecking order.

## VI. Law Review's Autonomy and Political Clout

Law review may be an elitist institution whose members are not truly elite. It may provide little in the way of intellectual and creative stimulation. Accordingly, its members may doubt their own talents and the value of their scholastic contribution. None of those criticisms, however, bears directly on the law review's potential to combat law school repression and law firm reactionism or to take a political stand. Yet the law review fails to live up to that potential as well.

### A. The Law Review's Imaginary Autonomy

I have identified several respects in which the law review fails to fulfill what I have labelled its affirmative dealienating potential.<sup>172</sup> It is not as communal, noncompetitive, creative, or satisfying as I suggested it might be. In fact, the law review is in some respects an independent source of alienation among both members and nonmembers. These observations might not be so troublesome if the law review fulfilled some of its negative dealienating potential—the reversal of some of those forces that weaken the oppressive powers. In practice, however, most of the sources of negative dealienation remain either untapped or ineffective.

The law review never uses the confrontational weapons at its disposal, its article selection power and power of the press, to influence the faculty or administration. Law reviews also fail to band together in mutual support against whatever oppressive forces the law schools might harbor.

The withdrawal element of negative dealienation is slightly more operative, although only minimally comforting. To be sure, the law review fulfills somewhat the sanctuarial function described in the preliminary defense of law reviews. It behaves, both physically and emotionally, as a refuge from law school oppression. Physically, the law review office is essentially off limits to faculty and administration. Emotionally, it provides a forum, albeit a private one with a limited audience, for students to ridicule professors and administration.

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172. See *supra* notes 34-46 and accompanying text.

The law review seems to stop at that comparatively superficial implementation of withdrawal. It falls short of true institutional autonomy, which, as the preliminary defense suggests, is considerably more powerful.<sup>173</sup> I do not mean to suggest that law reviews are, or generally perceive themselves to be, cronies of the established order. They believe themselves to be free to make decisions on the content and form of their product and to make institutional decisions on membership and organization. That perception of autonomy is certainly dealienating, but it is also somewhat illusory.

That law reviews are not truly autonomous is evidenced by their self-restraint. We will never know the boundaries of permissible law review conduct, because law reviews decline to test them. As far as substance is concerned, the *Ecology Law Quarterly* will never publish an article having nothing to do with environmental law. No main law review will ever purport to take a single political stand and advance it through its choice of articles.<sup>174</sup> Law reviews are not willing to diverge more than nominally from the traditional law review format. Many law reviews will not publish legal scholarship in haiku form<sup>175</sup> or iambic pentameter, nor produce a glossy color magazine. They are unlikely to publish an article that departs from the specific format that students have learned to identify with, and consider a *sine qua non* of, legal scholarship.<sup>176</sup> Moreover, there is a certain organizational restraint. No main law review, for example, would open up its membership to all students.

That law reviews never depart from the norm does not prove that they never can. An institutional lack of autonomy is not certain until the institution acts *ultra vires* and is rebuked. Since that rarely if ever hap-

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173. See *infra* text preceding note 35 (discussing institutional autonomy).

174. This rule holds true generally for more specialized law reviews as well, but there are exceptional ones—the most prominent of which are the *Harvard Women's Law Journal*, the *Journal of Law & Social Policy*, the *Harvard Civil Rights-Civil Liberties Law Review*, and the (now defunct) *Yale Review of Law & Social Action*—that have avowed political agendas. See, e.g., Howe, *Foreword*, 1 HARV. C.R.-C.L. L. REV. 1 (1966) (for “constructive proposal of efforts to make law an effective instrument for advancing the personal freedoms and human dignities of the American people”); *Tenth Anniversary Tribute*, 10 HARV. WOMEN'S L.J. (forthcoming 1988); *Why a Women's Law Journal?*, 1 HARV. WOMEN'S L.J. viii (1978) (“to develop a feminist jurisprudence”).

175. For a rare exception, see Sirico, *Supreme Court Haiku*, 61 N.Y.U.L.REV. 1224 (1986).

176. A few notable exceptions come to mind, but they are practically all by prominent scholars. See, e.g., Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1986); Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); cf. Estrich, *Rape*, 95 YALE L.J. 1087, 1087-89 (1986) (introducing article with account of author's own rape).

pens, there is no definite proof of autonomy limitations. The best I can do is to offer some speculations on the conditions that tend to limit the law review's autonomy.

In the first place, institutional inertia precludes radical departure from past institutional practices. That is particularly true when, as in the law review, the opportunities for assessment and effective power are short-lived. The time within which to appreciate the law review's failings, as a member, lasts at most two years and the authority to change them, as an editor, lasts one.<sup>177</sup> It takes nearly that long to get accustomed to each role.

Second, the institution lacks the collective confidence to deviate from the norm or the incentive to depart from past practice. Because each law review yearns to be as prestigious as *Harvard Law Review*, each is "sucked into a polite little game of follow-the-leader with the *Harvard Law Review* setting the pace."<sup>178</sup> Because law reviews have successfully retained their prestige for a century without departing substantially from the traditional form, there is a strong disincentive to change.

Finally, there is the ever-present, if unspoken, threat of faculty and administration disapproval. The main reviews are nearly always subsidized by the law school. Perhaps as important is the desirability of smooth relations. The administration and faculty hold the key to many nonpecuniary benefits, such as article solicitations, banquet speakers, clerkships, and the like. Armed with these carrots, the administration can effectively curtail action that does not meet their approval. Since the law review's reputation reflects on the law school's prestige, the administration will disapprove of any activity that threatens to diminish that prestige. For the same reasons that law reviews fear change, the effect of that administration veto is essentially conservative.

## B. Political Clout

If the law review does not successfully challenge or diminish the alienation in its own small community, it should come as no surprise that the law review does little to reverse that community's reactionism or its cozy symbiosis with the corporate law firm. In fact, far from deprogramming the curriculum's indoctrination or disrupting the law firm funnel, the law review reinforces the former and feeds the latter.

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177. See Kester, *supra* note 37, at 17 ("[a] student-run organization, whose members change yearly, is likely to be inherently conservative; its members usually lack confidence to distinguish the truly innovative from the foolish"); cf. Rotunda, *supra* note 38, at 11 (because of short "generational memory," law review repeatedly debates same issues).

178. Rodell, *Revisited*, *supra* note 109, at 285.

*(1) Law Review Repression*

The law review is more politically repressive than the institution of which it is a part.<sup>179</sup> I will not here summarize the vast literature from all sides most of which appears in law reviews, critical of the scholarship that law reviews publish.<sup>180</sup> Nor is it necessary to adopt wholesale any particular view of legal scholarship to conclude that if the law school curriculum pretends to a neutrality that is false, so too does law review scholarship. To the extent that the law school curriculum indoctrinates by making intuitive morality marginal to legal discourse, law review scholarship is unquestionably susceptible to the same charge, and if the law school thereby legitimates the status quo and shifts the student's visions of political action, the law review experience spurs that process.<sup>181</sup>

As if to ensure the parity, the law review selects its members on the basis of exams and writing competitions that measure at most the student's mastery of law school doctrinalism. If the law review selects for internalization of doctrine and reinforces the indoctrination by publishing articles that reflect the same myopia, it cannot deprogram its members or the student body generally.

The same false neutrality prevents the law review from affirmatively taking a political stand, much less taking affirmative political action, on the issues that motivated its members to enter law school in the first place.<sup>182</sup> On the simplest level, the law review typically is afraid even to comment on the material it publishes as do the editors of so many scholarly journals in other disciplines. That refusal to critique publicly the work of contributing authors can hardly be attributable to a dearth of controversial material. Surely, authors take positions in law review articles that are every bit as divisive among law review members as they are

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179. See *supra* notes 62-65 and accompanying text (discussing law school repression).

180. See, e.g., Baron, *Self-Criticism*, 60 TEMP. L.Q. 39 (1987); Cramton, *Demystifying*, *supra* note 19; Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1220 (1981); Kelman, *The Past and Future of Legal Scholarship*, 33 J. LEGAL EDUC. 432 (1983); Nowak, *supra* note 139, at 321-24; Rodell, *Revisited*, *supra* note 109, at 279; Schlag, *The Brilliant, the Curious, and the Wrong*, 39 STAN. L. REV. 917 (1987); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979). See generally *American Legal Scholarship: Directions and Dilemmas*, 33 J. LEGAL EDUC. 403 (1983); Kronman, *Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981).

181. See Schlegel, *supra* note 10, at 19 (law review, like law school, attempts to teach "that law must be separated from politics and that good arguments are seldom more than one step beyond existing arguments").

182. I use "affirmative" in the sense discussed earlier. See *supra* text preceding note 80. On the political motivations for entering law school, see *supra* notes 59-60 and accompanying text.



in the legal community generally. Consider, for example, Judge Bork's criticism of *Griswold v. Connecticut*<sup>183</sup> as "an unprincipled decision" that "fails every test of neutrality";<sup>184</sup> Richard Posner's suggestion that unwanted children should be sold on the open market;<sup>185</sup> and Robin West's thesis that Posner's reliance on consent as the moral justification of wealth maximization is misplaced because people often consent to changes in their worlds out of a Kafkaesque desire to submit to authority.<sup>186</sup> The law review editors, adhering to their vows of neutrality, write not a word in response to such controversial positions. The only time one might expect a peep out of the law review is when an article, such as this one, threatens the law review itself.

Given the reticence of law review editors to take positions on the material they publish, it should come as no surprise that they rarely advance political agendas openly through their selection of articles and virtually never take positions on important political issues of the day. To be sure, there are isolated cases in which law reviews have issued such political statements: *Harvard Law Review* in 1969 published a statement critical of the Vietnam War, by forty-four editors "speaking for themselves,"<sup>187</sup> and the *Georgetown Law Journal* editorial board, among others, recently opposed the apartheid regime of South Africa by declining to renew the University of South Africa's subscription.<sup>188</sup> There are

183. 381 U.S. 479 (1965) (use of contraception is a fundamental privacy right).

184. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971).

185. Posner, *The Regulation of the Market in Adoptions*, 67 B.U.L. REV. 59, 60-61 (1987).

186. West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 386 (1985).

187. See *With the Editors*, 82 HARV. L. REV. 6-8 (Jan. 1969). The accompanying explanation specifically noted that the statement "does not purport to speak for the *Review* as an ongoing institution . . ." A telling colloquy on the propriety of a law review's publication of political statements ensued:

A substantial minority of editors believe that . . . it is improper to use the *Review*, an institution built up over several decades for a nonpolitical purpose, as a forum for a statement on a political question. Advocates of the statement reply that . . . on a matter like the Vietnam war, which, they assert, transcends ordinary political issues, it is proper to record the views of editors . . . . Those who join the statement regard the occasion as unique and as most definitely not setting a precedent for statements on other political issues.

*Id.* at vii; see also Rotunda, *supra* note 38, at 2-3 (describing controversy surrounding publication of statement). It was not at all clear why such a precedent would be undesirable.

188. See Nat'l L.J., Jan. 28, 1985, at 12, col. 2 (letter condemning decision); *The Wrong Way to Protest*, Wash. Post, Jan. 26, 1985, at A18, col. 1 (editorial criticizing board's decision); L. Weekly, Dec. 3, 1984, at 2, col. 2 (editorial board's letter defending decision); L. Weekly, Nov. 19, at 2 (law review member's letter deploring action). After a prolonged and venomous battle, the membership overturned the decision. See *Georgetown Law Journal Rescinds South*

also exceptional law reviews that are themselves political statements,<sup>189</sup> but the rarity of blatantly political statements by main reviews and the exceptional nature of openly political specialized reviews underscores the ubiquity of the sentiment that law reviews ordinarily should not actively advocate political positions, even though their very silence is politically eloquent.

Rarer yet are the situations in which several law reviews act concertedly toward political ends. Significantly, the most prominent collaborative activity in which any law reviews engage is the formulation and revision of the bluebook by *Columbia Law Review*, *Harvard Law Review*, *University of Pennsylvania Law Review*, and *Yale Law Journal*.<sup>190</sup> A more apt metaphor for form over substance is hard to imagine.<sup>191</sup>

## (2) *The Law Review as Breeding Ground for the Law Firm Associate*

In light of the law review's complacency with law school repression and effective lack of autonomy even in its own realm, it should hardly be surprising that the law review never attempts to parlay the large law firm's dependence on it into leverage.<sup>192</sup> Nor is it surprising, given the virtual emptiness of the law review experience and its reinforcement of law school indoctrination, that the vast majority of law review members follow their classmates to the megafirms. Law review members are neither more competent nor more inclined than their classmates to decline the law firm's lure.<sup>193</sup>

What is initially surprising, however, is the premium that megafirms place on law review experience. More specifically, the firms that most value the experience are those with the greatest proportion of law review alumni. They are the ones who should know better. Having been

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*Africa Subscription Decision*, Nat'l L.J., Feb. 2, 1984, at 4, col. 2. Cf. *supra* note 100 (noting that several law reviews have affirmative action programs).

189. See *supra* note 174 (identifying several law reviews with political agendas).

190. The only other collaborative effort of which I know is an annual meeting of the National Conference of Law Reviews. See Fidler, *supra* note 9, at 49-50.

191. Judge Posner described the bluebook aptly:

[T]he Bluebook is elaborate but not purposive. Form is prescribed for the sake of form, not function; a large structure is built up, all unconsciously by accretion; the superficial dominates the substantive. The vacuity and tendentiousness of so much legal reasoning are concealed by the awesome scrupulousness with which a set of intricate rules governing the form of citations is observed.

Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343, 1343-44 (1986).

192. See *supra* text preceding note 80 (discussing law review's potential to convert law firm dependence into leverage).

193. See *supra* notes 66-78 and accompanying text (discussing factors reinforcing funnel from law school to law firm).

through it, they should be more aware than anyone that the law review experience does not, itself, generate top-notch lawyers.

I have already recognized the possibility that many law review members are oblivious to the emptiness of the law review experience. Perhaps the others, with the passage of years, romanticize the tedium like veterans romanticize combat. Either possibility would explain the patronage.<sup>194</sup>

There are also two more cynical explanations of law review patronage. One is that law review alumni are the ones who have the most to gain from the continued vitality of the law review myth. Like the third-year member who declines to divulge the law review's secrets,<sup>195</sup> the law review alumnus has a perverse incentive to perpetuate the myth by basing hiring decisions on it. What they sacrifice in efficiency, they gain in credential inflation.

For those who do not believe that any lawyer would ever put ego before money, there is another cynical explanation. While the law review experience does not produce the best *lawyers*, it does breed the best law firm *associates*.<sup>196</sup> Law review membership is the perfect training for law firm associateship because it conditions the subject to accept tedium and bow to hierarchy.<sup>197</sup>

Law review prepares the future associate unflinchingly to perform tedious and unchallenging tasks. The member graduates from endless and mindless bluebooking and production assignments in the law review office to late-night document production at the firm and prospectus-proofing at the printer.<sup>198</sup> The uninspired and irrelevant student note that no one reads translates into a dull memorandum on a trivial legal issue for a partner who merely skims it. While law review members are beaten with the bluebook paddle, the associate gets his spanking from

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194. Another possibility that pride compels me to relegate to a footnote is that I am simply wrong about the emptiness of the experience.

195. See *supra* text following note 153 (discussing why third-year law students maintain law review's secrets).

196. I once again acknowledge the assistance of Michael Small in helping develop many of the ideas that follow. See also Schlegel, *supra* note 10, at 18-20 (law review has always existed merely for the benefit of law firm and judicial employment).

197. See generally Boyle, *supra* note 6, at 19-20. The socialization is not, of course, foolproof. Even two years on law review might not prepare a member for the tedium and alienation of the megafirm. See Marcus, *Gloom at the Top: Why Young Lawyers Bail Out*, Wash. Post, May 31, 1987, at C1, col. 4.

198. See Nowak, *supra* note 139 at 322 ("I admit that the law review experience only will serve to make the law review editor more economically valuable to the larger firm or corporation.").

endless discovery or senseless motions that generate reams of paper and exorbitant legal fees but little else.

It is possible, although highly unlikely, that associates are content in the belief that those tasks are meaningful and essential to their development as lawyers. It is more likely that they complacently perform such chores because they believe as they did on law review that the tasks are (1) the only ones they are competent to perform, or (2) necessary to retain the law firm credential on their resume and the concomitant feeling of self-worth.

As to the former, the law firm, no less than the law review, fosters a feeling of incompetence. The partner or senior-associate oversight, the periodic evaluations, and the official reprimands and stiff sanctions for mistakes are all reminiscent of law review. The associate has already been conditioned to respond with self-doubt. This self-doubt leads the associate to the same conclusion that he drew in similar circumstances as a first-year student and as a law review member: "I *deserve* to take this shit. I am wrong and stupid."<sup>199</sup>

As to credential retention, by the time she enters the law firm, the law review alumna has been well-trained to endure hardship and tedium for the sake of credential and prestige. No one—certainly no one on law review—ever disabused her of the notion that a position with a law firm is a real credential and a worthwhile experience. With the high salary (over \$70,000 at the megafirms, plus clerkship bonuses),<sup>200</sup> the perks (housing allowances, spa memberships, firm outings, etc.), and the ego-massaging accoutrements (law review-like stationery with cabled and telex numbers, ornate business cards, and the like) that credential grows increasingly concrete. Law review has taught her how to cling to that credential to allay self-doubt. She clings also to the hope of parlaying the credential into even greater credentials, such as partnership or a position at a more prestigious law firm, just as the law review member clung to the law review credential for its value in interview season.

The law review also prepares the future associate to internalize hierarchies uncritically. The hierarchies within and among law firms are only slightly more rigid analogs of intra- and inter-school law review hierarchies. The same self-doubt is engendered by competing colleagues who believe their selection to have been worthier, the same subjugation by demeaning superiors who do not really know that much more than the new associate, and the same insecurity about the existence of other,

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199. See *supra* notes 17, 153 and accompanying text.

200. Marcus, *supra* note 198.

more prestigious firms. The capacity to doubt one's own capabilities in the face of hierarchies is valuable to the firm. It is a major obstacle between the associate and the exit.

### Conclusion

The law review's course is by no means irreversible. In discussing my thoughts on the law review with colleagues, they invariably raise the same question: "If the law review is such a bad institution, what's your alternative?" "Just do everything the opposite," is hardly a satisfying response. Although I have detailed a vision of the law review's potential and excoriated the law review for departing from it, I have presented no neat, programmatic solution to put the law review on the right track. At the risk of being labeled a nihilist,<sup>201</sup> I leave the proposal and defense of such a plan for another article. My goal, for now, has been more modest: to sensitize the legal community to problems and spur the search for solutions. If only I could convince a law review to publish this, or a lawyer to read it.

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201. *But see* Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).